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Calculating Fees of Special Masters

By DAVID I. LEVINE*

Appointments of special masters¹ have received a significant amount of attention in the academic literature. Judges have experimented with the use of special masters in the management of all phases of complex cases, including pretrial and discovery,² settlement,³ and particularly the creation and implementation of a court's remedial plan⁴ in institutional

* Associate Professor of Law, University of California, Hastings College of the Law. A.B. 1974, University of Michigan; J.D. 1978, University of Pennsylvania. I am grateful for the diligent research assistance of Mary Catherine M. Bohen, Alan J. Lazarus, and Lois Richardson, and for the helpful comments on prior drafts by Mary Kay Kane, Stephen LaPlante, and Vincent M. Nathan. I also express appreciation to my deans for making available summer research support for this Article.

1. As used here, "special master" refers to an experienced private attorney, a retired judge, or a law professor to whom a federal court delegates frontline judicial responsibility" on a *pro hoc vice* basis. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 1, 5 (1983) [hereinafter cited as *MANAGING COMPLEX LITIGATION*]; see Levine, *The Authority for the Appointment of Remedial Special Masters in Institutional Reform Litigation: The History Reconsidered*, 17 U.C.D. L. REV. 753, 754 n.4 (1984) (quoting Brazil, *supra*). Federal magistrates may perform similar functions. Magistrates are usually full-time court employees. They are always paid a salary by the court. Special masters are appointed *pro hoc vice* and virtually always are paid by one or more parties. See, e.g., FED. R. CIV. P. 53(a) advisory committee notes, 1983 amendment; Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1322-24 (1975) [hereinafter cited as Silberman, *The American Analogue*]; Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 796-97 (1975). But see Christy & Tessier v. White, 495 A.2d 1291, 1293 (N.H. 1985) (state of New Hampshire frequently compensates masters, rather than parties).

2. See, e.g., Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. — (1986) (comparing roles of masters in a variety of cases); Coolley, *Magistrates and Masters in Patent Cases*, 66 J. PAT. OFF. SOC'Y 374, 395-405 (1984). See generally *MANAGING COMPLEX LITIGATION*, *supra* note 1 (collection of articles on use of special masters in pretrial and discovery, with an emphasis on the use of special masters in the American Telephone & Telegraph antitrust case); see also Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation*, 69 JUDICATURE — (1986) (describing the use of special masters in an experimental effort to expedite dispute resolution); Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 275-76 (1985) (same).

3. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 752-53 (E.D.N.Y. 1984) (use of special masters to settle complex class action case brought on behalf of Vietnam veterans exposed to herbicides).

4. For cases appointing special masters in the remedial phase of institutional reform

reform litigation.⁵ One important topic, however, has not received a great amount of attention:⁶ the question of how the fees of special masters should be calculated.⁷ This oversight is curious because the fees of

litigation, see Levine, *supra* note 1, at 760-61 nn.22-25. For a list of articles on the subject, see *id.* at 754-55 nn.4-6, 759-60 nn.20-21; see also Alpert, Crouch & Huff, *Prison Reform by Judicial Decree: The Unintended Consequences of Ruiz v. Estelle*, 9 JUST. SYS. J. 291 (1984); Levinson, *Special Masters: Engineers of Court-Ordered Reform*, 8 CORRECTIONS MAG., Aug. 1982, at 6; Note, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission*, 8 HARV. ENVTL. L. REV. 435 (1984).

5. Many of the standard citations to the institutional reform litigation literature are collected in O. FISS & D. RENDLEMAN, *INJUNCTIONS* 827-30 (2d ed. 1984); see also Levine, *supra* note 1, at 753-55 nn.1-6, 759-60 nn.20-21. Newer scholarly works include: D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS* (1984); Combs, *The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective*, 13 J. LAW & EDUC. 345 (1984); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Jones, *Federal Court Remedies: The Creative Use of Potential Remedies Can Produce Institutional Change*, 27 HOW. L.J. 879 (1984); Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685 (1984); Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887; Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984).

6. Recently, however, there have been some indications that masters' fees are causing concern. See *Louisiana v. Mississippi*, 104 S. Ct. 1701, 1701-02 (1984) (Burger, C.J. & Blackmun, J., dissenting from order granting application by special master for fees of \$64,829.50 in original docket matter); *Legal Times*, Aug. 19, 1985, at 1, col. 2 (The United States Justice Department has "started to balk at paying its share of the special master's costs" in hazardous waste cases.); *San Francisco Chron.*, May 14, 1985, at 8, col. 1 (California state legislative subcommittee held hearings on projected \$200,000 fees for one year of monitor's services in federal prison case and voted to cut budget for monitor to \$150,000 despite warnings that federal court would overrule this action.). In the California example, the district court judge had appointed his 26-year-old former law clerk to the monitor position, and had ordered that he be compensated at the rate of \$75 per hour. *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1421-22 (N.D. Cal. 1984). The state legislative subcommittee was particularly upset at the rate for the young former law clerk, who had no prior prison monitoring experience, when the subcommittee learned that the state was paying only \$50 per hour for a monitor appointed in a case brought in state court concerning conditions in the same prisons. The cheaper monitor in the state court action had experience with prison monitoring in six other states and had 30 years of experience in corrections. *Id.* The California legislature ultimately forbade the Department of Corrections to use any of its budget to pay for the monitor in the federal case. *McCoy, Nice Work if You Can Get It*, 16 CAL. J. 375, 378 (1985) (reviewing the California controversy).

7. Scholarly commentary on this issue is sparse. See, e.g., J. HENDERSON, *CHANCERY PRACTICE* 989-1019 (1904); Comment, *Masters and Their Fees*, 3 MIAMI L.Q. 403 (1949). In federal court, the trial judges have broad discretion in deciding who shall pay the fee of the master under Federal Rule of Civil Procedure 53(a). Generally, the fees and expenses are treated as a cost under Rule 54(d). E.g., *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 134 (5th Cir. 1983) (affirmed taxing cost of special master to nonprevailing party); *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 476-77 (9th Cir. 1974) (same). Other arrangements are possible, however. See 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2608, at 796-98 (1971) (describing permissible variations); *Brazil*, *supra* note 1, at 28-34 (same).

special masters can be quite large.⁸ Moreover, the related matter of calculating court-set attorney's fees in, for example, civil rights cases, including institutional reform litigation, has received an enormous amount of scholarly attention.⁹

The purpose of this Article is to provide a thorough discussion of setting fees for special masters. The Article briefly reviews the history of the compensation of masters in England and in state courts. The Article then focuses on the attempts by federal courts to regulate special master fees in the United States, and considers in particular the appropriateness of the standards used in institutional reform litigation. The Article emphasizes the law in federal court because virtually all of the significant modern discussion of the problem occurs there. Next, the Article suggests modifications of these compensation standards in order to achieve a better balance between the needs of special masters for fair, adequate, and sure compensation and the interests of the parties and of the judicial system in receiving services at a reasonable rate.

The Article discusses four standards that federal courts have recently considered for setting masters' fees: First, unbounded discretion

8. *E.g.*, *Reed v. Rhodes*, 691 F.2d 266 (6th Cir. 1982) (reviewing second interim fee award of \$511,261.98 to special master); *Ruiz v. Estelle*, 679 F.2d 1115, 1172 (5th Cir.) (defendants ordered to deposit \$150,000 initially for interim payments of costs of special master), *modified in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). According to the *Ruiz* defendants, they have now paid over \$2.8 million to the special master's office. Letter from Texas Department of Corrections (Oct. 21, 1985) (copy on file with *The Hastings Law Journal*).

Although commentators have often noted the potentially burdensome expense of special masters, they have not focused directly on the appropriate standard for setting the fees. *E.g.*, *MANUAL FOR COMPLEX LITIGATION* § 3.21 (1981), *reprinted in* 1 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* 155 (2d ed. 1984); Brazil, *supra* note 1, at 25-34 (1983); Clark, *Difficulties Encountered in a System of Masters*, 23 F.R.D. 569, 570 (1958); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 453-54 (1958); Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419, 440-42 (1979) (brief indication of the problem of an appropriate standard); *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 393 (1960).

This Article focuses particularly on calculating hourly fees for remedial special masters, which is the most common and expensive method used. On occasion, courts have anticipated that the master's work will be so extensive that a full-time salary basis will be more cost-effective. *See, e.g.*, *Ruiz v. Procnier*, No. H-78-987-CA (S.D. Tex. June 11, 1984) (appointing a full-time monitor in the Houston Office of the Special Master at an annual salary of \$35,000); *Finney v. Mabry*, 458 F. Supp. (D. Ark. 1978) (contract signed hiring "Compliance Coordinator" at an annual salary of \$25,000).

9. The attorney fee literature recently has been collected in Christie, *Attorney Fee Shifting: A Bibliography*, 47 LAW & CONTEMP. PROBS. 347 (1984) (103 items cited). Subsequent major scholarly works include: M. DERFNER & A. WOLF, *COURT AWARDED ATTORNEYS FEES* (1984) (three volumes); Bartell, *Federal Court Awards of Attorneys' Fees*, in 2 CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 1057 (1984); *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984); *Attorney's Fees*, 1984 UTAH L. REV. 533.

of the trial court; second, application of a test, developed by the Supreme Court of the United States in 1922, that compensation should be "liberal but not exorbitant"; third, basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, basing the fee on some variation of the lodestar method¹⁰ of setting attorney's fees. This Article proposes that courts adopt the lodestar method, with appropriate modifications to suit the case of special masters. Then, after setting a lodestar, courts should consider a variety of factors that might affect the amount of compensation derived from the lodestar, such as preclusion of other employment, time limits imposed, results obtained, desirability or undesirability of the position, fee awards in similar cases, delays in payment, and professional responsibility considerations. The Article concludes that, in many instances, courts should adjust the lodestar downward as a result of these factors. It is less likely that courts will make an upward adjustment based on these factors.

Finally, this Article focuses on remedial special masters because the most comprehensive analyses and the largest fee awards to special masters have come in remedial contexts. The proposal made here, however, should be useful in establishing the fee of any special master.

Historical Overview of Special Masters' Fees

England

The early history of special masters' fees can be fairly described as sordid.¹¹ Although masters seem to have started out centuries ago as

10. The lodestar method begins by multiplying a reasonable hourly rate times the number of hours reasonably expended by the master. The resulting "lodestar" is then adjusted for special circumstances affecting the master's work. See *infra* text accompanying notes 243-79.

11. This Article focuses on special masters' fees and does not attempt to review the general history of the use of masters in England or the United States. For such discussion, see, for example, W. CLEPHANE, *HANDBOOK OF THE LAW OF EQUITY PLEADING AND PRACTICE* §§ 296-301 (1926); A. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* § 190 (1928); J. HENDERSON, *CHANCERY PRACTICE* 14-57 (1904); 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 416-45 (3d ed. 1922); 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 193-97 (2d ed. 1898); H. POTTER, *AN INTRODUCTION TO THE HISTORY OF EQUITY AND ITS COURTS* 15-22 (1931); 2 T. STREET, *FEDERAL EQUITY PRACTICE* §§ 1389-1470 (1909); Brazil, *Authority to Refer Discovery Tasks to Special Masters*, in *MANAGING COMPLEX LITIGATION*, *supra* note 1, at 337-44 [hereinafter cited as Brazil, *Authority*]; Ball, *The Chancery Master*, 77 *LAW Q. REV.* 331, 331-47 (1961); Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 *AM. B. FOUND. RESEARCH J.* 143, 149-60 [hereinafter cited as Brazil, *Referring Discovery Tasks*]; Bryant, *The Office of Master in Chancery: Colonial Development*, 40 *A.B.A. J.* 595 (1954); Bryant, *The Office of Master in Chancery: Early English Development*, 40 *A.B.A. J.* 498 (1954); Diamond, *The Queen's Bench Master*, 76 *LAW Q. REV.* 504 (1960); Silberman, *Masters and Magistrates*

rather ill-paid clerks,¹² over time the office became quite lucrative.¹³ Edward Jenks, a twentieth-century barrister in the Middle Temple, attributed the increased profitability of the office to the fact that administrative suits, such as the guardianship of infants and especially the management of decedents' estates, were treated as the private property of the master to whom the case was assigned.¹⁴ Masters had total custody and control of the funds involved for the years of such litigation. They were permitted to invest the funds for their personal benefit¹⁵ and paid no interest to the litigants on these sums.¹⁶

As a result of these practices, an appointment to a lifetime mastership became highly desired and was sold for great sums.¹⁷ Retiring masters collaborated with the Lord Chancellor, who actually made the appointments, to obtain payments from the new master in exchange for the appointment. The new appointee expected to recoup these payments and to make a profit during his mastership.¹⁸ This practice became so abusive that one Lord Chancellor, Lord Macclesfield (Thomas Parker),

Part I: The English Model, 50 N.Y.U. L. REV. 1070 (1975); Silberman, *The American Analogue*, *supra* note 1; Comment, *supra* note 7, at 403-07.

The English masters may have had a larger role in the normal processing of cases through Chancery than special masters have in modern federal courts in the United States, and thus were more capable of abusing their position to the detriment of the legal system. But the history demonstrates that there has been an age-old problem with compensating court officers on a nonsalaried basis.

12. See, e.g., Ball, *supra* note 11, at 333 (describing a "pathetic appeal" to the King in 1325 from a master's clerk who was sick and without means); *id.* at 337 (describing the seventeenth century as generally "one of squalor for the Masters"). But see 1 W. HOLDSWORTH, *supra* note 11, at 426 ("[I]t had been said of the Masters [in 1382] that they were 'over fatt both in bodie and purse. . . .'").

13. "[T]hat they gained considerable profit . . . is clear from the fact that in 1621 it could be asserted that eight of their number had given £150 apiece for their offices." 1 W. HOLDSWORTH, *supra* note 11, at 417.

14. E. JENKS, *A SHORT HISTORY OF ENGLISH LAW* 212 (2d rev. ed. 1922). An alternative explanation is that it became common in the late seventeenth century for investors planning to purchase mortgages to leave money with masters until the deeds were prepared and approved. The masters, who could be ordered to produce the money summarily, used the money for their own purposes until it was needed. Ball, *supra* note 11, at 338-39.

15. 1 W. HOLDSWORTH, *supra* note 11, at 440.

16. *Id.*

17. Trial of the Earl of Macclesfield, 16 Howell State Trials 767, 871 (1725) (In impeachment trial before the House of Lords for High Crimes and Misdemeanors, Master Elde testified that he had been told that 5000 guineas would be "handsomer" than the same number of pounds sterling.); 1 W. HOLDSWORTH, *supra* note 11, at 439 (office valued at £6000 at the beginning of the eighteenth century); H. POTTER, *supra* note 11, at 19 ("Master Elde, being very anxious to obtain the post, had actually carried 5,000 guineas round to [the Lord Chancellor's] house in a basket that there should be no delay."); Ball *supra* note 11, at 339 (£5000).

18. Ball, *supra* note 11, at 339.

was impeached in 1725 for, among other things,¹⁹ taking money for granting permission for the sale of the office of master.²⁰ After the scandals uncovered by the impeachment of Lord Macclesfield, masterships were no longer sold, but remained an important source of patronage because the master could appoint others to a number of positions in his office, such as that of Deputy Clerk.²¹

From early times, the greatest abuses of the judicial process arose from paying the masters and their assistants on the basis of fees for each service performed. Requiring as many forms and proceedings as possible was thus to their advantage. This in turn led to incredible delays and unnecessary expense.²² Charles Dickens' descriptions in the novel *Bleak*

19. Edward Jenks notes that the Masters had speculated heavily with litigants' money in South Sea Stock. When the South Sea Bubble burst in 1720, causing a huge deficit in litigants' funds, "the chief odium" fell upon Lord Macclesfield. E. JENKS, *supra* note 14, at 212-13; accord 5 J. CAMPBELL, *LIVES OF THE LORD CHANCELLORS* 384 (J. Mallory ed. 1874); 1 W. HOLDSWORTH, *supra* note 11, at 440. For a brief description of the bursting of the South Sea Bubble, see, e.g., 1 L. LOSS, *SECURITIES REGULATION* 3-5 & 4 n.6 (2d. ed. 1961) (citing scholarly and popular accounts).

20. H. POTTER, *supra* note 11, at 19; Ball, *supra* note 11, at 340. Ball states that the major issue at the impeachment trial was whether masters held judicial or ministerial office, there apparently being little question that Lord Macclesfield took the sums alleged. If masters held only ministerial offices, the sales transaction was not improper. If, however, masters held judicial office, a statute entitled *Against Buying and Selling of Offices*, 5 & 6 Edw. VI, ch. 16 (1552), had been violated. Lord Macclesfield was convicted, fined £30,000, and imprisoned in the Tower of London until the fine was paid. Trial of the Earl of Macclesfield, 16 Howell State Trials, 767, 1395-97 (1725). The fine was only a fraction of the nearly £101,000 deficit discovered in the accounts of four masters. 1 W. HOLDSWORTH, *supra* note 11, at 440.

Lord Macclesfield's problem seems to have been that he could not leave well enough alone:

But unfortunately for the accused earl the investigation proved that he had not been content with the accustomed honorarium, but had increased the price so enormously, that it became next to impossible for the appointees to refund themselves, or even to pay the amount, without either extorting unnecessary fees by delaying causes before them, or using the money deposited with them, to defray the sum demanded. That he employed an agent to bargain for him and to higggle about the price there is no doubt

8 E. FOSS, *THE JUDGES OF ENGLAND* 51 (London 1864 & photo. reprint 1966). The impeachment proceedings are completely reported in *Macclesfield*, 16 Howell State Trials 767. A summary of all the charges brought against Lord Macclesfield are in 12 W. HOLDSWORTH, *supra* note 11, at 205. For a description of the trial, see 5 J. CAMPBELL, *supra* note 19, at 386-403.

21. See 1 W. HOLDSWORTH, *supra* note 11, at 440-41. One commentator dryly noted that, because of patronage, "the office was not invariably filled by a competent official. Incompetence did nothing to shorten proceedings . . ." H. POTTER, *supra* note 11, at 19.

22. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 96 (2d ed. 1979) ("One typical innovation was to lengthen masters' reports by reciting the whole of the previous proceedings verbatim in a 'whereas' clause before starting on the substance of the report."); accord 9 W. HOLDSWORTH, *supra* note 11, at 361-64; H. POTTER, *supra* note 11, at 15, 19. One commentator highlighted:

[O]ne out of a hundred prominent sources of an enormous expenditure—the pay-

House of the dismal state of Chancery proceedings, including the conduct of proceedings in the masters' offices, did not exaggerate the true state of affairs in the first third of the nineteenth century.²³

Nineteenth century reforms in England focused on fixing the sala-

ment for copies of proceedings in the Master's Office. All documents and papers which in the course of the proceedings had to be submitted by any of the parties to the Master were copied by his clerks and furnished to each of the other parties whether they wanted them or not, at at least three times the ordinary charges for copying. Not to take copies or to shirk your copies was to incur the dangerous enmity of the office.

Birrell, *Changes in Equity, Procedure, and Principles*, in A CENTURY OF LAW REFORM 192 (1901 & photo. reprint 1972). Jeremy Bentham derided the "course of retardation to be run," with masters receiving payments for "three attendances, and bestowing one." J. BENTHAM, *Introductory View of the Rationale of Evidence*, in 6 THE WORKS OF JEREMY BENTHAM 43 (Bowring ed. 1843). Sir William Holdsworth noted the masters' resourcefulness at increasing fees by requiring needless attendances, warrants, and copies of papers. Reports were unnecessarily long because the size of the fee was based on length. Ingenious masters, having deliberately delayed the proceedings in a variety of ways, then charged a special fee for acceleration. 1 W. HOLDSWORTH, *supra* note 11, at 426, 441-42; see also 9 W. HOLDSWORTH, *supra* note 11, at 360. The Chancery Commission of 1850 summed up the procedure in the masters' offices as "obviously calculated to cause unnecessary delay and expense." Chancery Commission, *First Report of Her Majesty's Commissioners*, in 21 PARLIAMENTARY PAPERS 30 (London 1852).

23. Sir William Holdsworth, the great English legal historian, delivered the 1927 Storrs Lectures at Yale Law School on Dickens and the law. In one lecture, *Bleak House and the Procedure of the Court of Chancery*, he observed:

The physical fog amidst which *Bleak House* opens, which is so aptly made to typify the moral fog which enveloped the procedure of the Court of Chancery, is I think the finest piece of descriptive writing in the whole of Dickens's works. This moral fog had been produced by a variety of causes, operating through centuries; and its density had made the court the most crying abuse of an age in which there were many abuses.

W. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 85 (1928) [hereinafter cited as W. HOLDSWORTH, DICKENS].

In Holdsworth's view, "[i]t was in the master's offices that some of the worst delays took place, and the greatest expense was incurred." *Id.* at 98 (citing *Taff Vale Ry. v. Nixon*, [1847] 1 H.L.C. 111, 126-27, 9 Eng. Rep. 695, 701 (complaining of the chronic delay)).

Dickens knew something of these facts when he wrote,

"From the master, upon whose impaling files reams of dusty warrants in Jarndyce and Jarndyce have grimly writhed into many shapes; down to the copying-clerk in the Six Clerks' Office, who has copied his tens of thousands of Chancery-folio-pages under that eternal heading; no man's nature has been made better by it. In trickery, evasion, procrastination, spoliation, botheration, under false pretences of all sorts, there are influences which can never come to good."

W. HOLDSWORTH, DICKENS, *supra*, at 101 (quoting C. DICKENS, *BLEAK HOUSE*, ch. 1 (1852)); see also J. BAKER, *supra* note 22, at 95 ("For two centuries before Dickens wrote *Bleak House*, the word 'chancery' had been synonymous with expense, delay and despair."); R. NEELY, *THE LAWYERS OF DICKENS AND THEIR CLERKS* 51 (2d ed. 1938) ("Dickens was obsessed with the idea that the one great object of English law was to make business for itself."); Birrell, *supra* note 22, at 193 ("[N]obody . . . can deny the essential truth of *Jarndyce v. Jarndyce*.").

ries of masters, restricting their ability to set their own fees,²⁴ and establishing minimum levels of experience for the positions.²⁵ These reforms apparently succeeded in curbing the worst abuses of the masters.²⁶

United States

Control in the States

Compared to the colorful history in England, masters' fees in state courts need little discussion. The states have attempted to regulate the payment of fees to masters in a variety of ways. States have commonly used either strict statutory control through a fee schedule,²⁷ or statutorily delegated judicial discretion.²⁸ As in England, however, the masters had incentive to increase their work in order to increase their fees proportionately, regardless of which of the two methods of compensation was used.²⁹

24. An Act to abolish certain Officers in the Superior Courts of Common Law, and to make Provision for a more effective and uniform Establishment of Offices in those Courts, 7 Will. & 1 Vict., ch. 30, ss. 18-27 (1852); H. POTTER, *supra* note 11, at 20; Comment, *supra* note 7, at 405.

25. Ball, *supra* note 11, at 342; see also 1 W. HOLDSWORTH, *supra* note 11, at 442-45.

26. E.g., J. BAKER, *supra* note 22, at 97-98; 1 W. HOLDSWORTH, *supra* note 11, at 442-45; Birrell, *supra* note 22, at 191, 194-96.

27. E.g., MICH. COMP. LAWS § 600.2573 (1968) (fee schedule for circuit court commissioners and other persons), *repealed by* 1974 Mich. Pub. Acts 297, § 2 (effective April 1, 1975). Michigan law now discourages the use of masters for fact-finding. Karibian v. Paletta, 122 Mich. App. 353, 356, 332 N.W.2d 484, 485 (1983); Brockman v. Brockman, 113 Mich. App. 233, 237, 317 N.W.2d 327, 328 (1982).

In the past, some states also attempted to regulate medical and legal fees, as well as masters' fees, by enacting maximum fee schedules. See P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 62 & n.5 (1982) (citing Peters, Statutory Regulation of Lawyers' Fees in Massachusetts, New York, Pennsylvania, South Carolina, Tennessee, and Virginia from the mid-Seventeenth Century to the mid-Nineteenth Century (May 1975) (unpublished paper, Harvard Law School)).

28. E.g., ARIZ. R. CIV. P. 53(a); TEX. CIV. PROC. RULES ANN. R. 171 (Vernon 1981); see Comment, *Master in Chancery*, 5 BAYLOR L. REV. 374, 381 (1953) (Texas fee practice); Comment, *References in the Circuit Courts of Mississippi*, 38 MISS. L.J. 135, 147 (1966) (Mississippi fee practice).

29. See Brazil, *Authority*, *supra* note 11, at 339-40; Brazil, *Referring Discovery Tasks*, *supra* note 11, at 151-53. Another important system of fees for professional services in which the provider of the service in large measure has the power to decide how much service the "buyer" will receive and pay for—medicine—also shows that such a structure can lead to inflated costs. See, e.g., E. FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 141-43, 216-20, 225-31 (1970); P. STARR, *supra* note 27, at 225-32, 386-87; R. STEVENS, AMERICAN MEDICINE AND THE PUBLIC INTEREST 133-39 (1971); Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 948-54 (1963) (noting "strong institutional similarities between the legal and medical-care markets"); Bailey, *An Economist's View of the Health Services Industry*, 6 INQUIRY 3, 4, 11-13 (1969); Lave & Lave, *Medical Care and its Delivery: An Economic Appraisal*, 35 LAW & CONTEMP. PROBS. 252, 263-64 (1970).

Today only one state practices strict statutory control.³⁰ The vast majority of states command the court to fix the master's fee.³¹ The practice in a handful of states defies simple categorization.³² Some states give the parties free reign to set the fee.³³ Still other states have no general

30. WASH. REV. CODE ANN. § 4.48.100 (Supp. 1985) (measuring masters' fees by the salaries paid to judges pro tempore); *id.* § 6.32.280 (1963) (referees in supplemental proceedings receive \$5 per day).

31. Most of these states have adopted all or part of Rule 53(a) of the Federal Rules of Civil Procedure. ALA. R. CIV. P. 53(a); ALASKA R. CIV. P. 53(a); ARIZ. R. CIV. P. 53(a); ARK. R. CIV. P. 53(a); CAL. CIV. PROC. CODE § 1023 (West 1984); COLO. R. CIV. P. 53(a); DEL. CODE ANN. tit. 10, § 372 (1974); D.C. R. CIV. P. 53(a), 53-I; FLA. STAT. ANN. § 69.051 (West Supp. 1984); GA. CODE ANN. § 10-501 (Supp. 1984); HAWAII REV. STAT. § 92-16 (1976) (masters appointed by boards); IDAHO R. CIV. P. 53(a)(1); IOWA R. CIV. P. 208; KAN. STAT. ANN. § 60-253(a) (1983); ME. REV. STAT. ANN. tit. 4, § 501 (1979); ME. R. CIV. P. 53(a); MD. RULES 2-541(a)(2); MISS. CODE ANN. § 25-7-35 (1972); MONT. R. CIV. P. 53(a); NEB. REV. STAT. § 25-1137 (1979); NEV. R. CIV. P. 53(a); N.H. REV. STAT. ANN. §§ 491:23, 498:13, 519:7, 519:15 (Supp. 1983); N.J. CIV. PRAC. R. 4:41-2; N.M. R. CIV. P. 53(a); N.C. GEN. STAT. § 1A-1, Rule 53(d) (1983); N.D. R. CIV. P. 53(a)(1); OHIO R. CIV. P. 53(b); OKLA. STAT. ANN. tit. 12, § 619 (West 1960); OR. REV. STAT. § 21.510 (1983); OR. R. CIV. P. 65(a)(2); R.I. R. CIV. P. 53(a); S.D. CODIFIED LAWS ANN. § 15-6-53(a) (1984); TENN. R. CIV. P. 53.01; TEX. CIV. PROC. RULES 171 (Vernon 1981); UTAH R. CIV. P. 53(a); VT. STAT. ANN. tit. 32, § 1758 (1981); VT. R. CIV. P. 53(a) (provides that *state* shall pay fee determined at court's discretion); W. VA. CODE § 59-1-8 (1966); WYO. R. CIV. P. 53(a).

32. *E.g.*, CONN. GEN. STAT. ANN. § 52-434 (West Supp. 1984) (distinguishing State Referees formerly on the bench from those appointed from the bar; strictly controlling the compensation of retired justices, but delegating discretion for others); IND. R. TRIAL PROC. 53(a) (strict statutory control when the trial court sets the fee, but discretion in the state supreme court to award additional compensation); *see also* Reilly v. Robertson, 266 Ind. 29, 45-47, 360 N.E.2d 171 (trial court permitted discretion when acting with the "concurrence" of state supreme court), *cert. denied*, 434 U.S. 825 (1977); MINN. STAT. ANN. § 357.20 (West 1966) (setting lower and upper limits of \$5 and \$25 per day, but allowing judicial discretion to specify the exact amount, and further providing that the parties may stipulate to a higher fee, in which case they would be taxed the excess over the court's determination); MO. ANN. STAT. § 515.220 (Vernon 1952) (granting the court discretion to award up to \$10 per day); *Id.* § 476.450 (retired judges acting as referees to receive one-third their former salary); N.Y. CIV. PRAC. LAW § 8003 (McKinney 1981 & Supp. 1984-1985) (allowing \$50 per day, but providing that either the court or the parties can depart from that standard); S.C. CODE ANN. § 14-11-320 (Law. Co-op. 1976) (referees to receive \$3 per day, though parties may stipulate to a different fee); TEX. STAT. ANN. art. 5966a, § 12 (Vernon Supp. 1985) (active or retired judges acting as referees to receive \$25 per day in addition to their bench salary); VA. CODE § 14.1-133 (1978) (strict control for notary-type services, but discretion for other tasks); WIS. STAT. ANN. § 814.13 (West Supp. 1984-1985) (drawing a distinction between compulsory (discretion allowed) and consensual references (strict statutory control)); *see also id.* § 814.131 (West 1977) (requiring a hearing whenever the fee for a compulsory reference exceeds \$50). *But see* MINN. R. CIV. P. 53.01 (providing only that the court shall fix the referee's fees); N.Y. CIV. PRAC. R. 4321 (McKinney Supp. 1984-1985) (providing for judicial discretion); S.C. CODE ANN. § 15-37-140 (Law. Co-op. 1977) (master, special master or referee to receive "not less than \$25" per day); TEX. CIV. PROC. RULES 171, 172 (Vernon 1981) (masters in chancery and auditors, judicial discretion).

33. *E.g.*, CAL. CIV. PROC. CODE § 1023 (West 1984); GA. CODE ANN. § 10-502 (Supp. 1984); MINN. STAT. ANN. § 357.20 (West 1966); MO. ANN. STAT. § 515.220 (Vernon 1952);

statutory provision for fixing masters' fees.³⁴

The experience in the state of Florida provides a good example of the variety of approaches to setting special masters' fees. At one time, Florida attempted to combine statutory and discretionary approaches by establishing a fee schedule for the routine, ministerial tasks frequently performed by masters,³⁵ while permitting more generous compensation for work demanding greater skill.³⁶ Florida has now abandoned this mixed approach, however, and leaves the decision regarding a special master's compensation entirely to the court's discretion.³⁷

Toward a Modern Federal Standard

The modern federal view of an appropriate standard of compensation for special masters began to develop in 1897 with the Seventh Circuit's decision in *Finance Committee of Pennsylvania v. Warren*.³⁸ In that case, a special master was appointed for services in connection with the sale of a railroad.³⁹ After the property was sold for \$250,000, the master applied for fees of \$5,000. The trial court allowed a fee of \$4,000, which the master appealed. In reviewing the award, the Seventh Circuit panel first noted that the master holds a position of responsibility and trust, and that

his compensation should be measured accordingly. He should be remunerated for the actual work done, and the time employed, and the responsibility assumed. The amount of compensation should be fixed with due regard to the magnitude of the interests involved, and to the responsibility of the position. The amount of such compensation, while it should be reasonable, and perhaps liberal, should not be exorbitant.⁴⁰

N.Y. CIV. PRAC. LAW § 8003 (McKinney 1981 & Supp. 1984-1985); OR. REV. STAT. § 21.510 (1983); S.C. CODE ANN. §§ 14-11-310, -320 (Law. Co-op. Supp. 1984); WASH. REV. CODE ANN. § 4.48.100 (Supp. 1984); WIS. STAT. ANN. § 814.13 (West Supp. 1984-1985).

34. These states are Illinois, Louisiana, and Pennsylvania.

35. *Rainey v. Rainey*, 38 So. 2d 60, 62 (Fla. 1948); *Cohn v. Cohn*, 36 So. 2d 199, 200-01 (Fla. 1948); FLA. STAT. ANN. 62.07 (1943), *repealed by* 1967 Florida Laws, ch. 67-254, § 49 (effective June 26, 1967).

36. *Marion Mortgage Co. v. Moorman*, 100 Fla. 1522, 1526, 131 So. 650, 651 (1930); H. KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE § 141, at 306-07 (1939); *id.* at 111-12 (Supp. 1958); Comment, *supra* note 7, at 414-19; *A Synopsis of Recent Florida Cases*, 2 MIAMI L.Q. 305, 336-37 (1948); *see also* VA. CODE § 14.1-133 (1978) (commissioners in chancery receive notary-fees for notary-like services; fees for other services prescribed by the court).

37. *Donner v. Donner*, 346 So. 2d 1069, 1070 (Fla. Dist. Ct. App. 1977) (\$20,000 fee reduced to \$10,000 for trial court's abuse of discretion); FLA. STAT. ANN. § 69.051 (West Supp. 1984).

38. 82 F. 525 (7th Cir. 1897).

39. In this era, masters were frequently appointed to conduct judicial sales. Levine, *supra* note 1, at 777-78 & nn.97-100.

40. *Finance Comm.*, 82 F. at 527. The court continued:

Because the railway in question was "a small affair, being only 112 miles in length,"⁴¹ and it was known in advance that only one bidder would be at the sale, the court reasoned that the master's responsibility was not great. Recognizing that the trial court could be reversed only for abuse of discretion, the court of appeals nevertheless rejected the trial court's award. The court recognized that in other cases in which railroads had been sold for \$5,000,000 and \$3,000,000 respectively,⁴² each special master had received a fee of \$3,500. The court suggested that an allowance of \$2,500 in the case before it would have been "a full and liberal compensation, and possibly too much."⁴³ In the Seventh Circuit's view, any greater compensation would have been excessive under the circumstances.

In reaching its conclusion, the circuit court rejected approaches that other courts had taken. First, the court rejected a ruling⁴⁴ that compensation should be measured by the standard of judicial salaries, "which are not infrequently meager."⁴⁵ The court also rejected the considerably more generous view that the special master's fee should be based on a percentage of the value of stocks or bonds passing through his hands.⁴⁶ Finally, the court rejected the practice of permitting counsel to arrange the fee prior to the master's appointment. The appellate court reasoned that, because the master is an officer of the court and holds an office of dignity and responsibility, "[i]t is not to be tolerated that parties to a suit may hawk such employment about the street, and award it to the lowest bidder."⁴⁷ Otherwise, the master who had arranged his fee in advance risked being "the servant" or "a mere dummy"⁴⁸ of the parties, to be

Possibly, much ground for complaint would be avoided if the amount of compensation could be determined by some fixed standard. Yet so various and dissimilar are the services performed, and the character and extent of the responsibilities assumed, that it might work injustice to deal with such matters by any ironclad rule.

Id.

41. *Id.*

42. The court did not provide formal citations to these other cases.

43. *Finance Comm.*, 82 F. at 528.

44. *Id.* at 527 (rejecting *Middleton v. Bankers & Merchants Tel. Co.*, 32 F. 524 (C.C.E.D. Pa. 1887). *Middleton* expressed the theory that a master's compensation was properly measured by levels of judicial compensation because the master was aiding the court in the discharge of its judicial functions. 32 F. at 525. Long after *Finance Committee*, however, treatises continued to cite *Middleton* as an alternate approach. *E.g.*, 2 R. FOSTER, *FEDERAL PRACTICE* 1964 (6th ed. 1920); 3 G. LONGSDORF, *CYCLOPEDIA OF FEDERAL PROCEDURE* 985 (1928); 2 T. STREET, *FEDERAL EQUITY PRACTICE* §§ 1467-1468 (1909).

45. *Finance Comm.*, 82 F. at 527.

46. *E.g.*, *Erie Ry. v. Heath*, 8 F. Cas. 766 (C.C.S.D.N.Y. 1872) (No. 4516).

47. *Finance Comm.*, 82 F. at 528.

48. *Id.*; see also *In re Berkeley*, 203 F. 7, 12 (2d Cir. 1913) (Parties cannot make enforceable agreement as to compensation of master immediately after appointment.). The *Finance*

used for their own purposes.

Despite the *Finance Committee* court's attempt to create a workable standard, the lower courts for years thereafter were confused regarding an appropriate standard.⁴⁹ A major opportunity for clarification was lost in the early part of the twentieth century. A great reform movement⁵⁰ led to the promulgation in 1912 of the substantially revised *Rules of Practice for the Courts of Equity of the United States*.⁵¹ The rule regarding the standard of compensation for masters, however, was left unchanged.⁵² Masters' fees were left entirely to the discretion of the judges.

Committee court did note that, once the master's services had been rendered, "it would, of course, be agreeable to the court, and relieve it of responsibility, if the parties interested could agree with the master upon an amount of compensation satisfactory to both. But in advance of the appointment such agreements are improper, and in disrespect of the court." *Finance Comm.*, 82 F. at 528.

49. See, e.g., 2 R. FOSTER, *supra* note 44, at 1964-65 n.2; J. HOPKINS, THE NEW FEDERAL EQUITY RULES 131-32 (8th rev. ed. 1933) (practices from 1866-1911).

50. The reasons for the reforms are summarized clearly in Brazil, *Authority*, *supra* note 11, at 339-40. For earlier discussions of why the equity rules written in the nineteenth century were generally unsatisfactory, see, e.g., Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706-07 (1927); Breckenridge, *The Federal Equity Practice*, 5 ILL. L. REV. 545 (1911).

51. 226 U.S. 627 (1912). The most important reform affecting masters was the addition of the requirement, which in substance continues in Rule 53(b) of the Federal Rules of Civil Procedure, that "a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it." Equity R. 59, 226 U.S. at 18 app.; cf. Rule 74, 42 U.S. (1 How.) lxiv (1842), reprinted in J. HOPKINS, *supra* note 49, at 126. United States Circuit Judge John C. Rose believed the reason for this addition was that "references [to special masters] had become in many places so habitual as to result in much increased cost and in great waste of time." J. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS 496 (3d ed. 1926). The additional restrictive language in the rule did not prevent some judges from frequently referring cases to special masters. Lane, *Twenty Years Under The Federal Equity Rules*, 46 HARV. L. REV. 638, 655 n.51 (1933) ("Many members of the bar have a very strong feeling that the rules relating to masters' proceedings are being abused in some jurisdictions . . ."); Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 296 (1922) ("Some courts seem to disregard the change in Rule 59 and treat many cases as 'exceptional' and require very little showing concerning this 'condition' in referring cases . . ."). This problem continued until the Supreme Court held that the exceptional condition requirement, which had been carried over in principle into Rule 53(b) of the Federal Rules of Civil Procedure, was indeed a stringent hurdle limiting appointments of special masters. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). See generally Levine, *supra* note 1, at 800; Note, *Reference of the Big Case Under Federal Rule 53(b): A New Meaning for the "Exceptional Condition" Standard*, 65 YALE L.J. 1057 (1956).

52. The 1912 Rules provided that "compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof . . ." Equity R. 68, 226 U.S. at 669. The rule had been substantially the same when *Finance Committee* was decided. Rule 82, 42 U.S. (1 How.) lxvii (1842), amended by 152 U.S. 709 (1894). When preparing the Federal Rules of Civil Procedure, the Advisory Committee did not dramatically alter this provision, which became Rule 53(a) in 1938. See FED. R. CIV. P. 53(a) advisory committee notes, reprinted in 12 C. WRIGHT & A. MILLER, *supra* note 7, at 492 app. C (1973).

The United States Supreme Court attempted to end the confusion when it accepted a special master's fee case in 1922. In *Newton v. Consolidated Gas Co.*,⁵³ the Court reviewed the compensation and disbursements of the special master who had been appointed to serve in a group of eight cases involving the maximum selling rate for natural gas under New York state law. The lower court awarded the special master, who worked for a total of 282 days in the eight suits, a total compensation of \$118,000.⁵⁴ The master submitted reports to the trial court on four separate occasions.⁵⁵ In reviewing the court-awarded compensation, the Supreme Court recognized that it was bound by Equity Rule 68, which rested discretion in the district court.⁵⁶ The Court stated, however, that this discretion did not "extend to arbitrary and unreasonable action."⁵⁷

In establishing a standard for reviewing the district court's exercise of discretion in setting special masters' fees, the Supreme Court essentially adopted the standard that the Seventh Circuit had announced twenty-five years earlier in *Finance Committee*:

[T]he value of a capable master's services cannot be determined with mathematical accuracy, and estimates will vary, of course, according to the standard adopted. He occupies a position of honor, responsibility, and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed, and the responsibility assumed. His compensation should be liberal, but not exorbitant. The rights of those who ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings.⁵⁸

The Supreme Court then explained why, under these principles, the lower court had abused its discretion in setting the fee. The Court recognized that the master's services were "protracted, painstaking, and for

53. 259 U.S. 101 (1922).

54. *Id.* at 104. The "days" of work were calculated as five hours each, considered the average court day in the particular district. *Id.*

55. *Id.* The record in the longest case comprised approximately 20,000 printed pages; records from the other cases ranged from 1417 to 2929 pages. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (citing *Finance Comm.*, 82 F. at 527; *Middleton v. Bankers' & Merchants' Tel. Co.*, 32 F. 524, 525 (C.C.E.D. Pa. 1887)). The Court prefaced these citations merely with a "see" signal. There is no other indication that the Supreme Court had adopted the Seventh Circuit's position in *Finance Committee* and had borrowed liberally from that opinion's language.

the most part excellent," and that large sums were at stake in these cases.⁵⁹ Nevertheless, the Court said that, after reviewing the record, it could not "doubt that the allowances are much too large—certainly twice and three times what they should be."⁶⁰ By converting the master's time devoted to all of the cases, 282 days, to the equivalent of one year's service, the Court noted that the total allowance of \$118,000 was fifteen times the annual salary of the federal trial judge in the cases, and eight times that received by the Supreme Court justices themselves.⁶¹ The Court also compared the fee to the yearly salaries of the mayor of New York City (\$15,000), the governor and the judges of the highest court of New York (\$10,000), and the judges of the trial court in the City of New York (\$17,500).⁶²

Acknowledging that none of these salaries could serve as "a rigid standard," the Court stated that they should nonetheless be considered when determining the appropriate compensation for a special master. The Court also noted that the duties performed by this special master were not "more onerous or responsible than those often performed by judges."⁶³ Accordingly, the Supreme Court reversed the trial court's fee award, and remanded with instructions to set the compensation within specific limitations for each of the eight cases. The Court's instructions permitted a total compensation of not more than \$49,250, just over forty percent of the trial court's original award.⁶⁴

59. *Newton*, 259 U.S. at 104.

60. *Id.* at 106.

61. *Id.*

62. For the sake of comparison, recent salaries for these officials are:

Chief Justice of the United States—\$100,700

Associate Justice of the United States—\$96,700

United States District Judge—\$73,100

Mayor of New York City—\$80,000

Governor of New York State—\$85,000 (plus \$15,000 for expenses)

New York Court of Appeals Chief Justice—\$78,750

New York Court of Appeals Associate Justice—\$75,600

Supreme Court of New York—\$60,900

J. WRIGHT, *THE AMERICAN ALMANAC OF JOBS AND SALARIES* 162 (2d ed. 1984) (Mayor of New York City); COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES*, 1982-83, at 152-53, 256-57 (1983) (other New York officials); *THE WORLD ALMANAC & BOOK OF FACTS* 324-25 (1985) (federal judges).

63. *Newton*, 259 U.S. at 106.

64. The Court allowed a maximum of half the trial court's award in the longest case, and up to one-third in each of the seven smaller cases, up to the overall maximum. *Id.*

The Supreme Court had not seen the last of this case. The special master, a member of the bar of the Supreme Court, took the position that the Court's opinion, and the district court's order on remand, merely set the maximum amount of his compensation that could be recovered as costs from the party that had not advanced his fee. The master believed that he need not return the excess fee to the party who had paid initially. Because the fee had been

Application of Newton in the Lower Courts

Some courts and the leading commentators have viewed the *Newton* standard to be authoritative on compensation for masters in federal court.⁶⁵ Although the Supreme Court intended the *Newton* test to be used in fixing the compensation of masters, surprisingly, the lower courts frequently have ignored *Newton*. Lower courts often have granted awards of fees within their discretionary power under the Equity Rules, or later, the Federal Rules of Civil Procedure, without giving reasons under the *Newton* factors, or even acknowledging that the Supreme Court had spoken on the matter.⁶⁶

advanced by the party that had won on the merits, and the losing party had to pay no more than its share of what the Supreme Court permitted, the matter was not appealed immediately. The Court eventually held that the special master's position was untenable, and ordered the restitution of the excess fee with interest. *In re Gilbert*, 276 U.S. 6, 9 (1928). In a final opinion, Chief Justice Taft, speaking for a unanimous Court, stated that mere restitution of the excess fee, even with interest, was not sufficient punishment for the master's departure from duty. To demonstrate the "high obligation" of members of the bar to respect its decisions, the Court gave "a punitive quality" to its action. The master was suspended from membership in the bar of the Supreme Court for six months, and ordered to pay the costs of the proceeding. *Id.* at 298-99.

65. *E.g.*, *Aetna Casualty & Sur. Co. v. American Sur. of N.Y.*, 64 F.2d 577, 582-83 (4th Cir. 1933); *First Trust & Sav. Bank v. St. Louis Coke & Iron Co.*, 29 F.2d 506, 507 (7th Cir. 1928) (noting Supreme Court's admonition not to be "generous with other people's money"); *Reed v. Rhodes*, 516 F. Supp. 561, 568 (N.D. Ohio 1981) (*Newton* is "seminal"), *rev'd*, 691 F.2d 266 (6th Cir. 1982); *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1148 (D.N.J. 1979); *Pacific Gas & Elec. Co. v. Railroad Comm'n*, 14 F. Supp. 134, 135 (N.D. Cal. 1936). The leading modern treatises accept that *Newton* has defined the standard. 5A J. MOORE & J. LUCAS, *supra* note 8, ¶ 53.04[1]; 9 C. WRIGHT & A. MILLER, *supra* note 7, § 2608. There was initially some doubt whether this test was meant to be truly definitive. *See, e.g.*, *Roxana Petroleum Corp. v. Colquitt*, 34 F.2d 470, 479 (W.D. Tex. 1929) ("The court . . . does not feel the decision in [*Newton*] is so full and complete as to be controlling in any sense upon the court here, but to be considered as suggestive of matters proper for consideration by the court in fixing compensation."), *aff'd*, 49 F.2d 1025 (5th Cir.), *cert. denied*, 284 U.S. 669 (1931).

66. *See, e.g.*, the following cases, none of which cite *Newton*: *EEOC v. International Union of Elec., Radio and Mach. Workers*, 631 F.2d 81, 82 (6th Cir.), *cert. denied*, 449 U.S. 1010 (1980) (no abuse of discretion in setting \$2500 fee); *Morgan v. Kerrigan*, 530 F.2d 401, 425-27 (1st Cir.) (no abuse of discretion in setting fee of \$200 per diem for each of four masters), *cert. denied*, 426 U.S. 935 (1976); *American Safety Table Co. v. Schreiber*, 415 F.2d 373, 379-80 (2d Cir. 1969) (\$15,000 fee affirmed), *cert. denied*, 396 U.S. 1038 (1970); *Reid v. Silver*, 354 F.2d 600, 608 (7th Cir. 1965) (\$25,000 fee affirmed, even though it was "approaching the point of being excessive"); *Woods v. Piolet*, 187 F.2d 453, 456 (7th Cir. 1951) (\$1050 fee awarded by district court reduced to \$600); *Rauer v. Hatfield*, 295 F. 48, 52 (9th Cir. 1924) (Equity Rule 68 cited); *Chang v. University of R.I.*, 606 F. Supp. 1161, 1279 (D.R.I. 1985) (masters entitled to "reasonable compensation" and "reasonable expenses"); *In re Chicken Antitrust Litig.*, 560 F. Supp. 943, 956 (N.D. Ga. 1979) (fee request approved as "fair and reasonable"); *Texaco Export, Inc. v. Overseas Tankship Corp.*, 477 F. Supp. 289, 298-99 (S.D.N.Y.) (\$15,500 "reasonable" for 267.25 hours), *aff'd mem.*, 614 F.2d 1291 (2d Cir. 1979); *Chesa Int'l Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 238 (S.D.N.Y.) (\$100 per hour approved for hours for which master chose to charge), *aff'd mem.*, 573 F.2d 1288 (2d Cir.

Many of those courts that cited *Newton* did not analyze carefully the special master's compensation under the factors in that opinion.⁶⁷ Lower courts apparently rely on *Newton* primarily when they desire to reduce a special master's fee.⁶⁸ On rare occasion, however, courts have recog-

1977); *Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 612 (W.D. Okla. 1977) (\$5000 reasonable for 133 hours, based on time spent, nature of the reference, and unspecified circumstances); *In re Revenue Properties Co. Litig. Cases*, 61 F.R.D. 613, 615 (D. Mass.) (requested \$75,000 fee approved, court cited attorneys' fees cases), *vacated mem.*, 502 F.2d 1161 (1st Cir. 1974); *Glidden Co. v. Hellenic Lines*, 207 F. Supp. 262, 270-71 (S.D.N.Y. 1962) (\$3500 fair fee because of extenuating circumstances, even though report delayed one year after last hearing and was prepared in haste), *aff'd on other grounds*, 315 F.2d 162, 165 (2d Cir. 1963) (fee reduced to \$1500); *W.T. Jones & Co. v. Foodco Realty*, 206 F. Supp. 878, 891 (W.D. Va. 1962) (\$1000 fee awarded for 81 hours, master took "comprehensive depositions," and wrote "clear and . . . concise" report), *modified on other grounds*, 318 F.2d 881 (4th Cir. 1963); *Milwaukee Towne Corp. v. Loew's Inc.*, 139 F. Supp. 809, 818-19 (N.D. Ill. 1956) (\$15,000 request cut to \$12,500, one party objected to size of fee, no further reasons given); *Mallonee v. Fahey*, 122 F. Supp. 472, 480-81 (S.D. Cal. 1954) (\$100,000 fee set as "fair and reasonable"); *Robertshaw-Fulton Controls Co. v. Patrol Valve Co.*, 106 F. Supp. 427, 432-33 (N.D. Ohio 1952) (\$23,000 request cut to \$18,000 based on court's "considered judgment" and taking into account "the method of admeasuring the relative value to be attached to public, as compared with private, employment"), *aff'd*, 210 F.2d 146 (6th Cir. 1954); *Soya Processing Co. v. Sirota*, 104 F. Supp. 428, 434 (S.D.N.Y. 1952) (\$2500 fee approved; court considered time consumed, importance of matter, amount involved, standing of master in the bar, and master's thoroughness); *Dysart v. Remington Rand, Inc.*, 96 F. Supp. 655, 656 (D. Conn. 1950) (\$10,000 a reasonable award for 444 hours, including 25 days of hearings and extensive subsequent research and consideration; court considered that an attorney's annual net salary for 1500 billable hours would be close to \$20,000, "which might well be taken as a norm for services of a judicial nature of some difficulty and magnitude . . . that . . . might well be increased somewhat in a case of this size and complication"), *appeal dismissed*, 188 F.2d 306 (2d Cir. 1951); *Strong v. Broward County Kennel Club, Inc.*, 77 F. Supp. 262, 263 (S.D. Fla.) (parties agreed master's request for \$3500 reasonable), *appeal dismissed*, 170 F.2d 72 (5th Cir. 1948); *Penmac Corp. v. Falcon Pencil Corp.*, 62 F. Supp. 358, 360 (S.D.N.Y. 1945) (request for \$1200 plus disbursements fair and reasonable when master gave great deal of time and much study); *Gold Seal Importers, Inc. v. Morris White Fashions, Inc.*, 4 F.R.D. 386, 389 (S.D.N.Y.) (\$2000 request, \$1500 awarded), *aff'd*, 152 F.2d 660 (2d Cir. 1945); *John B. Stetson Co. v. Stephen L. Stetson Co.*, 58 F. Supp. 586, 597 (S.D.N.Y. 1944) (master's request for \$3000 cut to \$1500 for 27 hours of hearings over 6 days, 8 days studying record, briefs, and law, and 34 hours writing report); *United States v. 9,890 Acres of Land*, 57 F. Supp. 626, 628 (E.D.N.Y. 1944) (\$400 fee plus disbursements awarded); *Barrineau v. Carolina Milling Co.*, 52 F. Supp. 197, 200 (E.D.S.C. 1942) (special referee gave a great deal of time to case, including several days away from home and a thorough search of the law; in view of small amount involved, fair allowance set at \$200); *Sheldon v. Moredall Realty Corp.*, 29 F. Supp. 729, 733 (S.D.N.Y. 1939) (master's requested fee of \$1500 cut to \$1000); *Steinfur Patents Corp. v. Meisel-Galland Co.*, 27 F. Supp. 737, 741 (E.D.N.Y. 1939) (\$3000 fee requested and awarded, parties had no objections).

67. *E.g.*, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 86 F. Supp. 399, 419 (S.D.N.Y. 1949), *modified on other grounds*, 191 F.2d 99 (2d Cir. 1951); *cf.* *Pennsylvania v. Local 542, Operating Eng'rs*, 507 F. Supp. 1146, 1163 (E.D. Pa. 1980) (citing *Newton* in imposing cost of master on the party whose conduct necessitated the reference), *aff'd*, 648 F.2d 923 (3d Cir. 1981) (en banc), *rev'd on other grounds*, 458 U.S. 375 (1982).

68. *E.g.*, *Allen Bradley Co. v. Local 3*, 159 F.2d 669, 671 (2d Cir. 1947) (affirming district

nized the full import of *Newton* and have used the case as a springboard for a reasonably thorough discussion of the issues related to appropriate compensation of a special master. Because such complete analysis is so unusual, these cases deserve somewhat fuller discussion.

The oldest such case, *Universal Oil Products Co. v. Hall*,⁶⁹ dealt with a special master who had honored the office in the glorious tradition of Lord Macclesfield.⁷⁰ One Holmes Hall, an attorney practicing in Sedalia, Missouri, who previously had never earned more than \$5,000 per year, was appointed special master to take testimony and to prepare a report in a 1921 patent infringement suit between two oil companies. Hall obtained his appointment by calling upon the chief patent attorneys for the plaintiff and the defendant and soliciting their agreement to his appointment as special master. He then informed the district judge that he had reason to believe the attorneys would agree to his appointment.⁷¹ Upon his appointment, the special master first asked the parties for \$250 per day, and later for \$150 per day. The parties and the master, however, stipulated to a per diem of \$100, plus expenses, for all time spent away from home and all time devoted to the matter while at home, such as making the report. Compromising the master's demands for a higher fee, the stipulation also provided that the master could receive any additional sum allowed by the court.⁷²

From the outset, the master did not "comport himself with the dignity and reserve proper to the office."⁷³ The master's distinctive impropriety was that, long after he began serving and had heard substantial testimony, he approached a court reporter and proposed that the reporter attempt to bring about a settlement of the case. The master would pay the reporter, if successful, \$25,000⁷⁴ out of the anticipated fee of \$250,000 to \$300,000.⁷⁵ To the court reporter's credit, he promptly in-

court's allowance, "under the principles of *Newton*," of an additional award of only \$2500 to master who had requested \$20,000 extra compensation); cf. *Official Creditors' Comm. of Fox Mkts. v. Ely*, 337 F.2d 461, 464-66, 469-71 (9th Cir. 1964) (quoting "pertinent observation[s]" from *Newton* in reducing trial court's award of \$170,000, which was based upon request of attorneys for bankruptcy trustee for \$200,000 in fees, to \$50,000), *cert. denied*, 380 U.S. 978 (1965).

69. 76 F.2d 258 (8th Cir.), *cert. denied*, 296 U.S. 621 (1935).

70. See *supra* notes 19-21 & accompanying text.

71. *Hall*, 76 F.2d at 259.

72. *Id.*

73. *Id.* The master himself testified that he was like "the parrot that talked too damn much." *Id.*

74. The master may have offered "only" \$10,000. *Id.* at 260.

75. *Id.* The master testified that "I thought it was perfectly proper to advise Jones [court reporter] while I was Master that the thing for him to do was to paint as black a picture of the defense side to the defendant and to the plaintiff's side to the plaintiff." *Id.*

formed one of the defendant's attorneys that this offer had been made. The reporter then cooperated in a plan to obtain confirmation of the offer of a settlement fee from the master.⁷⁶ Upon receiving written confirmation, the defense attorneys prepared a motion for removal of the special master, but this formal petition was not filed. After discussion with the parties, and the intervention of a United States Senator who was a personal friend of the special master, the district court ordered important modifications to the special master's original appointment.⁷⁷ The master was deprived of the power to make findings of fact and conclusions of law, and he was no longer required to make a report. He was, however, permitted to continue as an examiner before whom testimony could be taken.⁷⁸

The master ultimately was paid \$99,900, at the stipulated rate of \$100 per day for 999 days.⁷⁹ After the suit was settled by the parties without a trial, the master filed a petition for additional compensation. Conceding that he had been fully paid under the original stipulation, he based his claim for additional compensation on "time which was lost to him in holding himself in readiness to resume and hold hearings at such time as the counsel might find convenient and agreeable."⁸⁰ Although the litigants responded to this petition by seeking a refund of all monies paid to the master because of his prior misconduct, the district court

76. The incriminating letter from the master confirmed the offer to pay the court reporter if the case were settled. The master explained that he would be saved an enormous amount of work because he would not have to prepare a report. Moreover, if the case were settled, he thought that he could represent "consistently, and with full propriety" any oil company later wishing to retain him. *Id.* at 261. On the other hand, if he had to render a decision, he would have spent three years as special master learning the oil refining business without "reap[ing] any advantage of the knowledge thus gained." *Id.* at 260-61.

The resourceful special master did not depend on legal services alone to reap a harvest from the expertise he gained in this case. Shortly after hearing the expert witnesses testify concerning the validity and extent of the oil-processing patents at issue in the lawsuit, the master claimed to have invented a similar process, and had an attorney prepare an application to patent his new "discovery." *Id.* at 261.

77. *Id.* at 262.

78. Under Equity R. 47-53, 226 U.S. 627, 661-64 (1912), an examiner was distinct from a master. An examiner could be appointed to supervise passively the taking of testimony and report it to the court. The examiner, however, had no power to regulate the deposition. *See, e.g.,* W. CLEPHANE, *supra* note 11, § 291; W. SIMKINS, *FEDERAL PRACTICE* § 790 (rev. ed. 1934). In Rule 53(a) of the Federal Rules of Civil Procedure, the term "master" was expanded to include the narrow examiner role. *See* AMERICAN BAR ASSOCIATION, *PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES*, CLEVELAND, OHIO, July 21-23, 1938, at 330 (W. Dawson ed. 1938) (remarks of Robert G. Dodge).

79. This sum was comprised of 550 days of taking testimony, and 447 days devoted to a study of the record and legal research preparatory to returning findings of fact and conclusions of law. *Hall*, 76 F.2d at 262. The two day discrepancy is unexplained.

80. *Id.*

allowed the special master the additional sum of \$12,000.⁸¹

In reviewing this award, the court of appeals held that the district court had erred in construing the parties' stipulation to require additional compensation.⁸² In any event, the trial judge was not restrained or bound by the stipulation. The appellate court stated that, upon being presented with the petition for fees and the evidence of the master's misconduct, the trial court's duty was "to make stern and searching inquiry into the facts."⁸³ Citing *Newton*,⁸⁴ the circuit court said that "no halfway measure should be considered, but the court officer must be held to strict accountability."⁸⁵ Because the master's powers to make findings of fact and conclusions of law had been withdrawn as a result of his misconduct, the sums paid to him to review the testimony and to conduct legal research were wasted completely. "[N]o possible ground" existed to justify permitting the master to keep the sums paid for these useless services.⁸⁶ Accordingly, the court believed that it had the plain duty to command the special master to restore all money paid for study in anticipation of making a report that he was no longer directed to render.⁸⁷ The court noted that restitution could be ordered upon the trial court's own motion or upon the motion of the litigants for an accounting and restoration of amounts lost due to misconduct.⁸⁸

In the course of reprimanding the master, and, by implication, the trial judge who merely had revised the master's powers instead of removing him and who had approved the request for additional compensation,⁸⁹ the Eighth Circuit provided its views of the proper status and conduct of a master.⁹⁰ That an appellate court had to review and reverse

81. *Id.* at 263. The additional compensation for "readiness" was calculated at \$2000 per year for six years.

82. *Id.*

83. *Id.*

84. 259 U.S. 101 (1922).

85. *Hall*, 76 F.2d at 263.

86. *Id.* at 264.

87. *Id.* *Hall* was ordered to repay \$44,700, plus six percent interest, from the date the district court stripped him of the powers of a special master and left him with the considerably more limited powers of an examiner. *Id.* at 265.

88. *Id.*

89. *Id.* at 262.

90. The court stated:

[A] master is a public servant engaged in a public function. He is an aide to the court of his appointment. He is not the servant of the litigants, nor the servant of their attorneys. He has a positive duty and must exercise firm discretion to cause the business confided to him to be brought to a conclusion within reasonable bounds of time. It is gross dereliction for him to seek to ingratiate himself with attorneys by blind indulgence or to sit supinely by while unconscionable delays defeat the ends of justice.

such an egregious case demonstrates the need for trial courts to monitor carefully the work of special masters and to review compensation requests with care.

The principles outlined in *Newton* are still alive, and not only in cases from two generations ago or in instances of gross abuse of office. A prime example is the 1979 case of *Kyriazi v. Western Electric Co.*⁹¹ The trial judge had previously determined that the defendant had violated Title VII⁹² by discriminating against its female employees. For the damages stage of the case, the court appointed three special masters to determine the validity of the claims of individual class members.⁹³ The trial court, with the agreement of the parties, needed three masters because there were ten thousand potential claimants, and in many of these cases, individual consideration of the claims would require a substantial amount of work. The parties and the court recognized that the special masters had to be experienced trial lawyers who would be prepared to deal with any discovery problems that might arise even before reaching the merits of individual cases.⁹⁴

Although the parties had agreed that the special masters needed particular skills, the defendant, found liable for the discrimination and therefore for the full cost of the master's compensation, suggested that under *Newton*, the compensation should be keyed to the salary of a district judge or, preferably, a magistrate.⁹⁵ The court rejected that suggestion, reasoning that it was in the best interest of the class members to appoint attorneys with strong reputations for integrity, community service, litigation skills, and experience.⁹⁶ To justify the imposition on the time of such highly qualified people, the court found that they should be compensated "in a manner comparable to what they receive in their private practices," without a limitation based upon the salary of a judge with no overhead, personnel, or other costs.⁹⁷ The court recognized, however, that in the "more typical case," an attorney appointed to serve as a special master should expect to receive "at least some of his compensation in the honor of his selection and service."⁹⁸ The court concluded that this was not such a case because of the substantial amount of time

Id. at 264.

91. 465 F. Supp. 1141 (D.N.J. 1979).

92. 42 U.S.C. §§ 2000(e)-(e)(17) (1982).

93. *Kyriazi*, 465 F. Supp. at 1143.

94. *Id.* at 1147.

95. *Id.* On that basis, the defendant suggested a rate of between \$30 and \$40 per hour.

96. *Id.*

97. *Id.*

98. *Id.* at 1147-48.

required to provide individual consideration to the large number of potential claims.⁹⁹

The district court then discussed and quoted from the *Newton* case. In its view, *Newton* held "that the proper compensation should be keyed to public salaries with a premium to attract persons of high caliber from the private sector."¹⁰⁰ The court noted that, since *Newton*, the issue of special master compensation had received little discussion. Consequently, some courts had approved awards roughly comparable to private practice renumeration,¹⁰¹ while other courts had used a lower rate.¹⁰²

In the face of uncertain precedent, the trial court found it to be in the interest of all parties and, in particular, in the interest of plaintiff class members, to compensate the three special masters in a manner roughly comparable to what they received in their practices. The court recognized the "thorny" path ahead for the masters, which would include "complex questions of damage, difficult and tedious discovery disputes, hearings and fact finding."¹⁰³ Not only would the masters be diverted from their own practices, which would cause a loss of present business income, they would also lose future business from foregoing successful attorney-client relationships as a result of the appointment.¹⁰⁴

The court acknowledged that the Supreme Court in 1922 suggested that special masters were in "temporary" employment and therefore should be compensated only "slightly in excess of the salaries of public officials."¹⁰⁵ This approach, however, was no longer viable in light of the realities of current law practice and the long-term nature of the masters' task. Accordingly, the court rejected the defendants' proposed level of compensation, which was less than many firms in the area billed for

99. *Id.* at 1148.

100. *Id.*

101. *Id.* (citing *Chesa Int'l Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234 (S.D.N.Y.) (\$100 per hour fee), *aff'd mem.*, 573 F.2d 1288 (2d Cir. 1977)); *American Safety Table v. Schreiber*, 415 F.2d 373 (2d Cir. 1969) (\$40 per hour rate approved in 1969), *cert. denied*, 396 U.S. 1038 (1970).

102. *Kyriazi*, 465 F. Supp. at 1148 (citing *Hart v. Community School Bd.*, 383 F. Supp. 699 (E.D.N.Y.) *appeal dismissed*, 497 F.2d 1027 (2d Cir. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), as holding that fee of law professor in school desegregation case would be about half that charged by attorneys in private practice, but all overhead costs paid).

103. *Kyriazi*, 465 F. Supp. at 1148.

104. *Id.*

105. *Id.* Although the district court stated that the Supreme Court in *Newton* had permitted compensation only "slightly in excess" of the salaries of public officials, in fact, the guidelines adopted in *Newton* provided for compensation substantially above prevailing salaries for high public officials, including the Supreme Court Justices themselves. See *supra* text accompanying notes 59-64.

paralegal clerical help.¹⁰⁶ The court instead awarded \$125 per hour to the attorney designated as the Administrative Special Master, and an hourly rate of \$115 to the other two masters. This was less than what each would usually bill for such service, but the three attorneys had indicated their willingness to accept less than their normal rates because of their obligations as members of the bar.¹⁰⁷

Hall and *Kyriazi* show that judges who are cognizant of *Newton* and attempt to supervise a special master's compensation under its standards are much more likely to give reasoned and appropriately careful supervision to the special master's fee request. On the other hand, standardless review of a fee request is simply an arbitrary exercise of discretion¹⁰⁸ and is less likely to lead to a careful and fair evaluation of a master's fee request.

The Fees of Remedial Special Masters: The *Reed* Saga

In general, the judges who have appointed remedial special masters in institutional reform cases have been no more scrupulous than in other cases in their use of the *Newton* factors to establish an appropriate master's fee. In the typical institutional reform case, the trial judge establishes a figure for the special master's fee, but does not explain it under *Newton*.¹⁰⁹ It is surprising that the judges have not been especially careful with the fees for remedial special masters, because in several cases the fees have had symbolic significance as a point of defiance for various state officials and legislators.¹¹⁰

106. *Kyriazi*, 465 F. Supp. at 1148.

107. *Id.*

108. See *infra* text accompanying notes 222-26.

109. E.g., *Ruiz v. Estelle*, 679 F.2d 1115, 1172 (5th Cir.) (District court set master's fee at \$95 per hour in statewide prison case.), *modified in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1131 (M.D. Tenn. 1982) (ordering parties to submit name of person to be appointed special master in prison case; noting that master will be paid at a monthly rate to be later established, and inviting parties to suggest appropriate rate); *New York State Ass'n for Retarded Citizens v. Carey*, 551 F. Supp. 1165, 1194 (E.D.N.Y. 1982) (setting fee of special master for Willowbrook State School at \$325 per diem, up to 150 days per annum, plus budget for assistants and expenses), *aff'd in relevant part*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Halderman v. Pennhurst State School & Hosp.*, 526 F. Supp. 428, 434 (E.D. Pa. 1981) (special master ordered to submit budget providing for substantial reductions in the costs of operating the master's office supervising institution for the mentally retarded), *aff'd*, 673 F.2d 628 (3d Cir. 1982) (en banc), *cert. granted*, 457 U.S. 1131, *restored to calendar for reargument*, 463 U.S. 1226 (1984); *Valentine v. Englehardt*, 474 F. Supp. 294, 305-06 (D.N.J. 1979) (setting master's fee at \$85 per hour in county jail case); *Morgan v. Kerrigan*, 401 F. Supp. 270, 272 (D. Mass. 1975) (\$200 per diem for each of four special masters in school desegregation case reasonable), *aff'd*, 530 F.2d 401, 425-27 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

110. In the *Pennhurst* case, the state defendants were held in contempt and incurred fines

On rare occasion, a court cites *Newton*, but does not thoroughly dis-

of \$10,000 per day rather than obey a court order to obtain an appropriation for funding the office of special master. *Halderman v. Pennhurst State School & Hosp.*, 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd*, 673 F.2d 628 (3d Cir. 1982) (en banc), *cert. denied*, 104 S.Ct. 1315 (1984). The district court transferred some of the fines to the special master to operate his office. *Halderman v. Pennhurst State School & Hosp.*, 526 F. Supp. 428, 430 (E.D. Pa. 1981).

In the Willowbrook State School case, the trial court found the governor and comptroller of the State of New York in contempt when they failed to persuade the state legislature to appropriate \$342,000 to support a review panel, which had been a provision of the case's consent judgment. *New York Ass'n for Retarded Citizens v. Carey*, 492 F. Supp. 1110 (E.D.N.Y. 1980). The Second Circuit reversed the contempt finding because the consent judgment required the governor to act only "within his 'lawful authority' . . . and subject to any legislative approval that may be required." *New York Ass'n for Retarded Citizens v. Carey*, 631 F.2d 162, 166 (2d Cir. 1980). In addition, several federal courts have been forced to use their rarely invoked authority under Rule 70 of the Federal Rules of Civil Procedure to require payments in institutional reform litigation when state officials have refused to issue checks. *Spain v. Mountanos*, 690 F.2d 742, 744-45 (9th Cir. 1982); *Gary W. v. Louisiana*, 622 F.2d 804, 805-07 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *Gates v. Collier*, 616 F.2d 1268, 1270-72 (5th Cir. 1980), *reh'g granted*, 636 F.2d 942 (5th Cir. 1981); *La Raza Unida v. Volpe*, 545 F. Supp. 36, 37-39 (N.D. Cal. 1982) (attorney's fee cases).

The modern record for state defendant pique toward a master's fee in federal court probably was achieved in the Arkansas prison litigation. *See generally* O. FISS & D. RENDLEMAN, *supra* note 5, at 528-752 (thorough review of the entire course of the litigation). In one of the many published opinions in the case, *Finney v. Mabry*, 458 F. Supp. 720, 724 (E.D. Ark. 1978), the district court approved a consent decree in which the parties agreed to hire a compliance coordinator at the defendants' expense rather than have the court formally appoint a special master. For a discussion of the distinction between a special master appointed under Rule 53 and the more experimental compliance coordinator, see LaPlante, *An Alternative to the Special Master: Institutional Planning with a Compliance Coordinator* (Aug. 18, 1980) (Paper for 110th Congress of Correction of the American Correctional Association) (on file with *The Hastings Law Journal*). After Stephen LaPlante, the compliance coordinator, served for about two and one-half years, the defendant Board of Correction refused to renew his contract, citing a lack of confidence in his work. *But see LaPlante says politics block reform*, *Ark. Democrat* (Little Rock), June 7, 1981, at 1, col. 1. The district court allowed termination of the position of compliance coordinator, but ordered LaPlante to write a final report in preparation for another evidentiary hearing on compliance with the previous court decrees. LaPlante was given 45 days to file his report; the court later extended the time another 15 days. *Finney v. Mabry*, No. PB-C-69-24 (D. Ark. Mar. 31, 1981 & May 12, 1981). Although the state paid LaPlante and his staff for the initial 45 days (as it had for the previous two and one-half years), the state legislature repeatedly refused to pay \$2000 for the final 15-day extension for LaPlante and one of his assistants. *[Governor] White has authority to ensure payment made*, *LaPlante says*, *Ark. Democrat* (Little Rock), Aug. 16, 1981, at A12, col. 1; *Legislative Council again refuses LaPlante pay*, *Ark. Democrat* (Little Rock), Aug. 15, 1981, at B1, col. 1; *Paying \$2,000 for Extension Again Refused*, *Ark. Gazette* (Little Rock), July 10, 1981, at A2, col. 2. The legislature continued to withhold payment until after a hearing in which the district court ordered payment "forthwith." *Finney v. Mabry*, No. PB-C-69-24 (D. Ark. Aug. 28, 1981); *State Issues Checks to Pay LaPlante*, *Ark. Gazette* (Little Rock), Sept. 1, 1981, at 1, col. 1; *see also Citizens' pockets picked to pay LaPlante, official says*, *Ark. Democrat* (Little Rock), Aug. 30, 1981, at 1, col. 1. When LaPlante returned to Arkansas to testify in the hearing on whether the defendants finally had brought the prisons into compliance with the court's orders, *see Finney v. Mabry*, 534 F. Supp. 1026 (E.D. Ark. 1982), the trial judge refused to permit him to be compensated as an expert witness at \$45 per hour. In the judge's

cuss it. The best example of this limited deference to *Newton* is a well-known school desegregation case, *Hart v. Community School Board*.¹¹¹ In *Hart*, Judge Weinstein cited *Newton* and Federal Rule of Civil Procedure 53 as authority for the district court's discretion to determine the amount of the master's compensation and who shall pay that compensation.¹¹² The court, however, did not analyze expressly the factors expressed in *Newton*. Rather, in a short paragraph near the end of a very long opinion, it simply deferred the question of the amount of compensation and noted that "[p]reliminary discussions with counsel suggest that a reasonable fee would be based upon about half that obtainable by private attorneys in commercial matters."¹¹³ In the order appointing the special master, a law professor with expertise in housing matters,¹¹⁴ the court granted the master permission to apply from time to time for compensation and reimbursement of expenses and ordered the master to keep time records.¹¹⁵

In one case, however, the issues of appropriate standards for setting a master's compensation and the use of *Newton* were debated extensively between the district court and its supervising circuit in a series of opinions. Because they illustrate the problems in this area, these opinions are discussed here in detail.

*Reed v. Rhodes*¹¹⁶ involved desegregation of the Cleveland, Ohio public schools. In a ninety-page opinion, Judge Battisti of the Ohio District

view, LaPlante was merely testifying to facts he observed as a former employee of the Department of Corrections, not as an expert. *Expert Fees Are Sought for LaPlante*, Ark. Gazette (Little Rock), May 12, 1982, at B7, col. 6. LaPlante has reported that he never even received compensation of \$30 per day as a factual witness, although he was reimbursed for his transportation to prepare for and testify at the five-day compliance hearing. Personal interview with Mr. LaPlante (March 28, 1985). I thank Mr. LaPlante for providing much of the documentation for this paragraph.

111. 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

112. *Id.* at 767. The court also cited a case from a neighboring district, E.I. DuPont de Nemours & Co. v. Purofied Down Prods. Corp., 176 F. Supp. 688 (S.D.N.Y. 1959).

113. *Hart*, 383 F. Supp. at 767.

114. This master has chronicled his experiences. Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). He does not discuss his fees, however.

115. *Hart*, 383 F. Supp. at 768.

116. 422 F. Supp. 708 (N.D. Ohio 1976) (*Reed I*), *remanded mem.*, 559 F.2d 1220 (6th Cir. 1977), *opinion issued after remand*, 455 F. Supp. 546 (N.D. Ohio), *remedial order entered*, 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd in part & remanded in part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980). The Cleveland desegregation effort has been called "a textbook example of the pitfalls that even the most energetic master can encounter." Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 378 (1981). For a description of the master's role in Cleveland and the obstacles to reform in this "dinosaurian" school system, see *id.* at 350-51, 357-59, 363-66, 368-69, 378.

Court found that the defendant boards of education had violated the plaintiffs' constitutional rights by intentionally fostering and maintaining segregated schools within the city's public school system. In the conclusion to the lengthy opinion, the judge indicated that he intended to appoint a special master to assist the court with remedies. The judge also announced his plans to appoint a panel to assist the special master with input from legitimately affected interest groups. The court ordered the parties to submit proposed instructions to the special master and suggestions for the structure and membership of the panel.¹¹⁷

Two weeks later, on September 14, 1976, the district court appointed a Cleveland tax attorney as special master.¹¹⁸ Two months later, the judge substituted two experts for the panel of assistants, one to work with the state board of education and one to work with the city board of education.¹¹⁹ Upon the recommendation of the special master, the court ordered the appointment of a large firm of certified public accountants to assess the financial operations and management capabilities of the school district.¹²⁰

In December 1977, the special master applied for interim fees for himself and his law firm, the court appointed experts, and the public accounting firm. Although the court initially approved these requests,¹²¹ the court vacated its order and asked the master to update the application.¹²² The district court then reviewed the amended application without taking testimony on the reasonableness of the requested fees. However, the court required counsel for the defendants to disclose their billings to their clients. Additionally, the court ascertained the amounts that the state and city boards of education had been charged by other attorneys, the same public accounting firm, and other consultants in unrelated matters. Finally, the court directed counsel for plaintiffs to submit their proposed hourly rates for work on the case.¹²³ The district court ultimately entered an order for interim fees, allowing the full

117. *Reed I*, 422 F. Supp. at 797.

118. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 740 (6th Cir. 1979) (*Reed II*). The circuit opinion reviewed the series of unpublished district court orders described here.

119. *Id.*

120. *Id.* at 742. The special master and a state auditor had found many deficiencies in the records and procedures of the Cleveland Board. These problems, the master concluded, made it difficult for the school board members to make knowledgeable policy decisions regarding the desegregation process. *Id.* at 741.

121. The master sought \$301,760 for himself and his firm as interim fees through October 31, 1977; \$31,332.40 for one expert, an authority on school administration; \$65,250 for the other expert, a law professor; and \$58,086 for the certified public accounting firm. *Id.* at 742.

122. *Id.*

123. *Id.*

amounts requested except for the law professor expert.¹²⁴

On appeal, in *Reed II*,¹²⁵ the defendants did not question the time spent by the master and his law associates. The defendants did question the hourly rates and the total fee allowance. The Sixth Circuit quoted extensively from the district court's memorandum opinion granting fees. The district court had set the hourly rate of \$110 per hour for the special master by referring to the prevailing rate in the Cleveland area for legal fees of experts in cases of this complexity.¹²⁶ The district court also considered the rates charged by private counsel in the desegregation case itself.¹²⁷ These rates ranged from \$70 to \$130 per hour, "centering" at approximately \$100 per hour.¹²⁸ The circuit panel¹²⁹ acknowledged that the district court had applied the standards set forth in *Newton* in determining that the payments to the special master and his law firm were reasonable.¹³⁰ Focusing on the gross amounts, however, the court explained its reasons for concluding that the fees awarded to the master were unreasonable and excessive.¹³¹

First, Judge Lively noted that the district court considered only the top rates billed by Cleveland law firms, because "the special master's work was confined to that requiring a high degree of expertise and judgment."¹³² In reviewing the itemized statements, however, the appellate court noted many hours spent "gathering information . . . telephoning . . . [and] corresponding."¹³³ These activities were not as demanding as conducting hearings, meeting with the presiding judge and the attorneys, or evaluating the plans ultimately submitted by the defendants.¹³⁴ Moreover, when dealing with the most difficult problems, the special master

124. The special master and his law firm received an average rate of \$110 per hour. The accounting firm requested and received \$60 per hour. One expert received \$40 per hour as requested. The other expert, the law professor, requested compensation at the rate of \$75 per hour, but received \$60 per hour. *Id.* at 742-43.

125. 607 F.2d 737 (6th Cir. 1979). The Sixth Circuit discussed the fee issue in this companion opinion to its opinion on the substance of the district court's findings regarding segregation in Cleveland's schools. *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980).

126. *Reed II*, 607 F.2d at 744.

127. *Id.*

128. *Id.*

129. Judge Lively wrote for a unanimous court, including Chief Judge Edwards and Judge Engel. *Id.* at 737.

130. *Id.* at 744.

131. The district court award amounted to \$300,000 per year, or \$445,000 as of the cut-off date for the interim award. *Id.* at 744-45.

132. *Id.* at 745 (quoting from district court's memorandum opinion).

133. *Id.*

134. *Id.*

had the assistance of the public accounting firm and the advice of two experts, one a nationally recognized authority on education administration and the other a constitutional law professor.¹³⁵ In addition, the record showed that associates in the special master's law firm gathered much of the information and attended meetings on behalf of the master.¹³⁶

The circuit court did not believe that these facts justified a total disallowance for any of the hours spent by the master and his firm. However, these facts were relevant in applying the principles developed by other courts asked to set reasonable compensation in public interest cases.¹³⁷ The court then turned to the opinion in *Hart*, in which the district court pointed out that "counsel in the case had suggested 'a reasonable fee would be based upon about half that obtainable by private attorneys in commercial matters.'" ¹³⁸ The *Reed II* court panel declared that this standard reflected a "generally accepted principle that the highest range of fees in private litigation is not a proper basis for compensation of masters."¹³⁹ With little elaboration, the *Reed II* panel stated that "many of the considerations which apply to the setting of attorneys' fees in public litigation apply to setting the fees of a special master."¹⁴⁰ Ignoring its own prior citation to *Newton*, the court declared that fair com-

135. *Id.*

136. *Id.* The circuit court noted that these associates had been admitted to the bar in 1973 and 1975, but had qualified earlier as certified public accountants.

137. *Id.*

138. *Id.* (quoting *Hart*, 383 F. Supp. at 767).

139. *Reed II*, 607 F.2d at 745. In support, the panel quoted a 27-year-old opinion from the Northern District of Ohio concerning a special master in a patent matter, *Robertshaw-Fulton Controls Co. v. Patrol Valve Co.*, 106 F. Supp. 427 (N.D. Ohio 1952), *aff'd*, 210 F.2d 146 (6th Cir. 1954). There, the trial judge had stated: "The Court sitting in equity does not feel at liberty to allow compensation to be paid by litigants upon the same basis as might be the case in private relationship." *Id.* at 432, *quoted in Reed II*, 607 F.2d at 745-46.

140. *Reed II*, 607 F.2d at 746. The panel did discuss institutional reform cases establishing attorney's fees by reference to the Criminal Justice Act. In the famous case of *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. (1972), *modified*, 503 F.2d 1305 (5th Cir. 1974), Judge Johnson awarded attorneys' fees to the successful plaintiffs in a mental institution reform suit on the basis of the schedule established by the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1) (1982) (Twenty dollars per hour for out-of-court work and \$30 per hour for in-court time. The Act was amended in 1984 to provide for hourly rates not exceeding \$40 for out-of-court work and \$60 for in-court work. 18 U.S.C.A. § 3006A(d)(1) (Supp. 1985)). The panel quoted Judge Johnson's statement that the Act's schedule established "a reasonable basis upon which lawyers can carry out their professional responsibility without either personal profiteering or undue financial sacrifice." *Reed II*, 607 F.2d at 746 (quoting *Wyatt*, 344 F. Supp. at 410). The panel also cited Sixth Circuit Judge Weick's concurring opinion in a school desegregation case, in which he had suggested that the schedule of attorneys' fees in the Criminal Justice Act could be taken into account. *Reed II*, 607 F.2d at 746 (citing *Oliver v. Kalamazoo Bd. of Educ.*, 576 F.2d 714, 718 (6th Cir. 1978) (Weick, J., concurring)).

pensation could be determined by application of the "Hart formula of 'about half that obtainable by private attorneys in commercial matters.'" ¹⁴¹ Therefore, the court concluded that reasonable compensation for the special master was \$65 per hour, one-half the highest Cleveland rate found by the district judge and about two-thirds the average rate of experienced Cleveland trial attorneys.¹⁴² The court approved a rate of \$40 per hour for associates in the master's law firm.¹⁴³

The *Reed II* panel then reviewed the awards to the other assistants of the special master. The court had no trouble affirming an award to the certified public accountants of \$60 per hour ¹⁴⁴ and to the educational administration expert of \$40 per hour, ¹⁴⁵ because the defendants did not challenge the amounts. The court had greater difficulty with the constitutional law professor's fee. The panel noted that masters are used because they possess skills and experience that the district courts frequently lack.¹⁴⁶ Courts, however, are presumed to have expertise on legal issues, including constitutional law. Further, on legal matters, courts have the assistance of the attorneys of record and their own staffs, which include qualified law clerks. In this particular case, additional help was available because the United States was an amicus and had participated actively through attorneys from the Civil Rights Division of the Justice Department.¹⁴⁷ Thus, if the master was not qualified to make recommendations because of a lack of experience in constitutional law, those issues should have been submitted to the district judge.¹⁴⁸ The use of the law professor here, the *Reed II* court noted, resulted in a "partial abdication" of the judge's role,¹⁴⁹ which was one of the main criticisms of the use of special masters in nonjury cases.¹⁵⁰ The court, therefore, questioned whether there had been any compensable contribution in the work of the law professor.¹⁵¹

The circuit court then reviewed the hours billed by the law professor, and concluded that approximately one-third involved activities not

141. *Reed II*, 607 F.2d at 746. The court rejected, without further explanation, the fee schedule of the Criminal Justice Act because it was not "sufficient." *Id.*

142. *Id.*

143. *Id.* The trial court's \$445,000 interim award accordingly was reduced to \$240,358.

144. *Id.*

145. *Id.* at 747.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 747-48 (citing Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958)).

151. *Reed II*, 607 F.2d at 747.

included in the statement of his appointment. Among these were research and writing for the court, and meetings with the court and its staff. The panel held that those hours should not be paid for by the defendants.¹⁵² Rather than the \$60 hourly rate awarded by the district court, the circuit panel granted the professor \$50 per hour because he was a full-time faculty member of a local law school and did not have the overhead of a private law office.¹⁵³ The court felt that this was fair and reasonable compensation commensurate with the \$65 hourly rate allowed the special master.¹⁵⁴

The court concluded with a reminder that "[c]ourts must never lose sight of the fact that the fees in a case of this kind are paid from public funds. Every effort should be made to keep these expenses as low as is reasonably possible."¹⁵⁵ The Sixth Circuit recommended fixing the fee rate of the special master at the time of appointment and requiring submission of monthly vouchers. This procedure would give the parties the advantage of knowing in advance the actual rate of compensation and would make them aware of actual costs as they accrued.¹⁵⁶

Two years later, the Cleveland case spawned another round of opinions concerning the master's fees. In *Reed v. Rhodes (Reed III)*,¹⁵⁷ the district court again addressed a series of pending applications for master's fees. Ignoring the circuit's admonition to the master to submit monthly vouchers, these applications covered the period from March 1, 1978, to August 30, 1980.¹⁵⁸ The court held a three-day hearing on the matter in March 1981. The special master contended that the circuit's *Reed II* opinion did not apply to the pending fee requests "because of the differences between these and the earlier applications in, among other factors, type of work performed, quantity of work involved, and overall conditions."¹⁵⁹ The defendants objected to the master's request for compensation at a rate higher than that established in *Reed II*, although they

152. *Id.* at 748. Although the court saw another 300 hours worked as also not clearly within the description of the professor's authorized duties, it resolved those doubts in his favor.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* The panel referred with approval to the court's practice in the Milwaukee school desegregation case. *Amos v. Board of School Directors*, 408 F. Supp. 765, 824 (E.D. Wis.), *aff'd sub nom. Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *vacated & remanded on other grounds*, 433 U.S. 672 (1977).

157. 516 F. Supp. 561 (N.D. Ohio 1981) (*Reed III*). This opinion exclusively concerns the special master's fee.

158. In four applications, for different portions of the time period, the master requested a total of \$548,394.21 in fees and \$13,088.19 in expenses. *Id.* at 564.

159. *Id.*

recognized that the base rates might be adjusted upward for inflation.¹⁶⁰ The defendants also contended that the master was not entitled to compensation for any time spent in *Reed II* defending the fees previously authorized by the district court.¹⁶¹

The district court, in a remarkable display of independence, refused in *Reed III* to follow literally the Sixth Circuit's *Reed II* holding. To district court Judge Battisti, the whole issue of the appropriate compensation for a special master required careful reexamination, and although it was "not so intended," he was "aware that [his] decision may be construed as a dissent to the Sixth Circuit's opinion."¹⁶² The court noted that the special master had provided quality service in an atmosphere of hostility and recalcitrance, created primarily by the local defendants. The defendants were not merely unable to implement school desegregation; to a great extent, they also were unwilling.¹⁶³ Thus, the master found it much more difficult and time consuming to formulate and implement an appropriate remedy.¹⁶⁴ After describing the various tasks that the master had performed,¹⁶⁵ the judge noted that the master brought to bear "considerable legal, financial and management expertise."¹⁶⁶

Having established the qualitative value of the master's work, the judge turned to the question of the appropriate standard for the master's fee. The court observed the "singular lack of case law respecting appro-

160. *Id.*

161. For discussion of the propriety of awarding "fees on fees" in the attorney's fee context, see 2 M. DERFNER & A. WOLF, *supra* note 9, ¶ 16.02[3], at 16-19 to 16-22. The defendants also contended that the special master should not be compensated for any time spent by an associate in the master's firm assisting the court in the preparation of findings on the school board's contempt of court. Apparently, the Sixth Circuit's prior criticisms of nonjudicial personnel assisting the district judge on purely legal matters prompted this contention. See *supra* text accompanying notes 144-54.

162. *Reed III*, 516 F. Supp. at 565. The district court elaborated:

The Court is confident that it has been every bit as deliberate as the Court of Appeals in reaching its decision. With full appreciation of the need for orderliness in the system, and fully cognizant of the fact that it is bound by the law of the circuit, the Court has made every effort to apply the substance of relevant principles of law, equity, and, above all, reason.

Id.

163. *Id.*; see also *supra* note 120.

164. The court declared that it knew of no other city in the country where the defendants had been "so completely unhelpful" in implementing a desegregation order. Therefore, the defendants had only themselves to blame for the high cost of the special master's services. *Reed III*, 516 F. Supp. at 565.

165. This took almost three full printed pages in the opinion to summarize. *Id.* at 565-68.

166. *Id.* at 568. The court complimented the special master for the significant benefit that his work had provided to the school system, especially in management and finance, and to the court, in the form of reports "which were always of the highest quality." *Id.*

priate compensation for special masters in public litigation.”¹⁶⁷ The court then quoted from *Newton*, which it called the “seminal” case in that area.¹⁶⁸ The court declared that, while it had followed *Newton* in its earlier fee award, the Sixth Circuit’s reversal in *Reed II* followed “a passing remark” in the *Hart* case.¹⁶⁹ Judge Battisti noted that the circuit panel had “nonetheless opined that ‘many of the considerations which apply to the setting of attorneys’ fees in public litigation apply to setting the fees of a special master.’”¹⁷⁰ With that statement of the *Reed II* panel, the judge was “entirely in agreement.”¹⁷¹

Judge Battisti then quoted from the *Kyriazi* opinion, which had used attorneys’ fees awards as the rough comparison for the master’s rates.¹⁷² The district court argued that *Kyriazi* was distinguishable from the desegregation case before it because the fees in *Kyriazi* were set in advance of the assumption of duties and paid by a private entity rather than from the public coffers.¹⁷³ Thus, while *Kyriazi* was significant, it did not articulate appropriate fee standards for masters in public litigation.

The district court also stated that the *Hart* standard, even though it had been adopted by the Sixth Circuit, was “in this Court’s opinion, inapposite to the presently pending fee applications.”¹⁷⁴ The court pointed out that the master in *Hart* was assisting the court in the formulation of the remedy. This was also the primary task of the special master when the Sixth Circuit reviewed the fee application in *Reed II*. The primary task facing the master during the period covered by the pending application, however, was the implementation of the remedial order. The district court noted that, although formulation of a remedy was not an easy task, it was “of finite duration, manageable proportions, and . . . subject to control.”¹⁷⁵ In contrast, implementation, especially with hostile defendants, was “indefinite in duration, considerably more taxing on energy

167. *Id.*

168. *Id.*; see *supra* text accompanying note 58.

169. Here, Judge Battisti quoted Judge Weinstein more fully: “Preliminary discussions with counsel suggest that a reasonable fee would be based upon about half that obtainable by private attorneys in commercial matters.” *Reed III*, 516 F. Supp. at 568 n.4 (quoting *Hart v. Community School Bd.*, 383 F. Supp. 699, 767 (E.D.N.Y. 1975)).

170. *Reed III*, 516 F. Supp. at 568 n.4 (quoting *Reed II*, 607 F.2d at 746).

171. *Reed III*, 516 F. Supp. at 568 n.4

172. *Id.* at 568-69 (quoting *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1148 (D.N.J. 1979)). For discussion of *Kyriazi*, see *supra* text accompanying notes 91-107.

173. The judge then, however, immediately quoted from a Third Circuit case involving the City of Philadelphia, indicating that it should not matter whether a public or private entity would be paying an attorneys’ fees award. *Reed III*, 516 F. Supp. at 569 (quoting *Rodriguez v. Taylor*, 569 F.2d 1231, 1249 n.32 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978)).

174. *Reed III*, 516 F. Supp. at 569.

175. *Id.*

and resources, and far less susceptible to control by the master of time and scheduling."¹⁷⁶ Therefore, a more generous fee standard was appropriate to assess the new application.¹⁷⁷

Exploring the attorney's fee analogy, the district court noted that the Sixth Circuit, after applying the *Hart* formula in *Reed II*, subsequently had awarded attorneys' fees in public litigation at rates comparable to the fair market value of the services.¹⁷⁸ The district judge regarded an opinion of the Court of Appeals for the District of Columbia, *Copeland v. Marshall*,¹⁷⁹ as "[b]y far the most cogent and articulate decision setting forth an objective and rational set of criteria for determining a reasonable attorney's fee in civil rights actions"¹⁸⁰ The *Copeland* court took the approach of calculating a "lodestar" fee and then adjusting for various factors, including quality of service.¹⁸¹ The district court agreed with *Copeland* that a lodestar, which consists of the number of hours reasonably expended multiplied by a reasonable hourly rate, is "the only reasonably objective" starting point for a court-awarded attorney's fee.¹⁸² The court concluded that the lodestar method was also a fair and reasonable basis for compensation of a special master.¹⁸³

The district court then calculated a lodestar for the master's fee application. The court began by estimating the number of hours reasonably expended, and determined that it was equal to the number of hours the

176. *Id.* The district court relied upon a distinction drawn by Professor (and frequent special master) Vincent M. Nathan between a "pre-decretal" master, who assists in the formulation of the remedy, and the "post-decretal" master, who monitors and implements the remedy. *Id.* (citing Nathan, *supra* note 8, at 428).

177. *Reed III*, 516 F. Supp. at 569.

178. *Id.* at 569-70 (citing *Northcross v. Board of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)). The court observed that, in order to secure the services of competent and experienced attorneys as masters, they must be guaranteed compensation no less than would be available to them as attorneys. Further, public litigation attorneys should receive the same fees as attorneys doing private work to encourage the prosecution of civil rights violations. Thus, masters, who make significant personal sacrifices in the public interest, should not suffer an unreasonable financial sacrifice in addition. *Reed III*, 516 F. Supp. at 570 & n.7.

179. 641 F.2d 880 (D.C. Cir. 1980) (en banc). The approach adopted in *Copeland* is discussed elsewhere. See, e.g., Breger, *Compensation Formulas for Court Awarded Attorney Fees*, 47 LAW & CONTEMP. PROBS. 249 (1984).

180. *Reed III*, 516 F. Supp. at 570.

181. *Id.* at 572.

182. *Id.* at 570 (quoting *Copeland*, 641 F.2d at 891 (quoting *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973))).

183. The district court also quoted a Sixth Circuit opinion for a principle similar to the rationale of the *Newton* standard: "Attorneys' fee awards should be high enough to attract competent counsel yet not so high as to provide a windfall for them." *Reed III*, 516 F. Supp. at 570 (quoting *Oliver v. Kalamazoo Bd. of Educ.*, 576 F.2d 714, 715-16 (6th Cir. 1978)).

master claimed.¹⁸⁴ With respect to the hourly rate, the district court noted the *Copeland* view that "the reasonable hourly rate 'is that prevailing in the community for similar work.'"¹⁸⁵ The court thought such a standard was "easily applied" to setting a fee for public litigation attorneys.¹⁸⁶ A more complicated analysis, however, was needed for special masters because masters perform many services that are not completely legal in nature. Because the master may do work more typically performed by management consultants, financial advisors, and accountants, the appropriate reasonable hourly rate for special masters would be the prevailing rates for similarly experienced professionals performing similar work. Thus, there might be more than one reasonable hourly rate for each attorney. The rates would depend upon the customary fee for the particular type of work, the experience, reputation, and ability of the person performing the work, and the level of skill necessary to perform the duties properly.¹⁸⁷

The tasks performed by the special master in this case fell into two major categories: professional services¹⁸⁸ and administrative services.¹⁸⁹ The court concluded that the master should be compensated for professional services at the rates requested for himself and for associates from his law firm.¹⁹⁰ The requested rates were comparable to the prevailing rate in the community for lawyers of the special master's experience (approximately \$150 an hour or more) and to the top rates charged by counsel in *Reed* to the local board of education (\$150 to \$160 per hour). For example, the highest rates charged by the large private firm acting as principal counsel ranged from \$130 in early 1978 to \$155 in August

184. *Reed III*, 516 F. Supp. at 571. The court noted that the master could have claimed many more hours than he did. For example, he did not claim time spent on Saturdays, and he habitually rounded down to the nearest quarter-hour. The court also rejected the "bizarre" suggestion that the special master should not be compensated for the time spent by an associate in the special master's firm who had prepared proposed findings of fact and conclusions of law. *Id.* The court handled separately another defense challenge regarding time spent on the appeal of the fee award in *Reed II*. See *supra* text accompanying notes 125-56; *infra* text accompanying notes 201-06.

185. *Reed III*, 516 F. Supp. at 571 (quoting *Copeland*, 641 F.2d at 892 (footnote omitted)).

186. *Reed III*, 516 F. Supp. at 571. Many commentators would disagree with the court's premise that this standard is easy to apply in the public litigation attorney's fee context. See, e.g., articles cited *infra* note 197.

187. *Reed III*, 516 F. Supp. at 571.

188. For example, the master conducted hearings, researched and wrote reports, and conferred with counsel. The judge did not distinguish between in-court and out-of-court time, just as the large private law firm representing the local school board did not. *Id.* at 572 & n.10.

189. For example, the master disposed of special transfer requests by students, arranged meetings, and shared information with the media. *Id.* at 572.

190. *Id.* These rates ranged from \$125 to \$150 per hour for the special master, depending on when the services were rendered, and from \$50 to \$90 per hour for associates. *Id.* at 564.

1980. Moreover, those charges did not include administrative expenses that the special master's firm absorbed, such as reproduction, postage, and messengers.¹⁹¹

With respect to administrative services, which did not require as high a level of skill and experience, the district court determined that the special master and his associates should be compensated at eighty percent of the rates approved for professional services. The court estimated that approximately thirty percent of the time billed was spent on administrative matters.¹⁹²

After calculating the lodestar, which amounted to a total of \$460,977.66,¹⁹³ the district court considered whether to make any adjustments. The court referred to the Fifth Circuit's opinion in *Johnson v. Georgia Highway Express, Inc.*,¹⁹⁴ which set forth twelve factors¹⁹⁵ relevant to setting an attorney's fee in public law litigation.¹⁹⁶ The district court recognized that the *Johnson* factors were not completely applicable to setting fees for a special master in public litigation, because a master's position as an agent of the court was different from that of an attorney litigating a case.¹⁹⁷ Accordingly, the district court, using in part modifi-

191. *Id.* at 572. There was also evidence that the prevailing rates for senior associates in the community ranged from \$90 to \$125 per hour. *Id.*

192. *Id.* at 572-73.

193. This figure was equivalent to an average hourly rate of \$106.33. *Id.* at 573.

194. 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors are considered a standard judicial approach to calculating an attorney's fee. *E.g.*, 2 M. DERFNER & A. WOLF, *supra* note 9, ¶ 15.03[3]; Bregier, *supra* note 179, at 253-54; Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 238-39 n.167 (1984); Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331 (1980).

195. The twelve *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the legal questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment for the attorney by the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limits imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

196. The *Copeland* court had stated that these factors were "'central to any fee award.'" *Reed III*, 516 F. Supp. at 573 (quoting *Copeland*, 641 F.2d at 889).

197. The court might have added that the *Johnson* factors have been criticized in commentary published before *Reed III*, because the Fifth Circuit did not explain how the various factors were to be weighed and how a court should deal with the factors that overlap and conflict. *See, e.g.*, Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 286-87 (1977); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 372-73 (1980); Note, *Court-Awarded "Reasonable" Fees: Forcing a Segregated Public Interest Bar?*, 7 FORDHAM URB. L.J. 399, 406 (1979); Comment, *supra* note 194, at 376-78. The Fifth Circuit recently has attempted to give further direction to its district courts. *See* 2 M. DERFNER & A. WOLF, *supra* note 9, ¶

cations of some of the *Johnson* factors, established a set of factors for adjusting the lodestar figure for a public litigation master. The new factors were "(1) The preclusion of other employment by the Master due to acceptance of the position; (2) Time limitations imposed by the Court or the circumstances; (3) The results obtained; (4) The undesirability of the position; [and] (5) Awards in similar cases."¹⁹⁸

Applying these factors, the court first noted that the master's law firm undoubtedly had suffered as a result of the master's diversion from his practice. In addition, the master frequently had worked under severe time constraints. Finally, the master's friends had advised him that accepting the position could only hurt his practice and reputation, because the position was highly visible, controversial, and subject to constant public scrutiny. Despite these problems, the court stated that the special master produced excellent quality work that was greatly beneficial to the court and to the school system.¹⁹⁹ Although these facts could justify upward adjustment of the lodestar figure, "the court, mindful of the admonition in *Newton* . . . that '[t]he rights of those who ultimately pay must be carefully protected,' conclude[d] that the lodestar figure represents reasonable compensation for the master's services."²⁰⁰

The district court then turned to the defendant's contention that the special master was not entitled to any compensation for the time spent or the costs incurred in litigating *Reed II*, in which the Sixth Circuit had reversed the fee award in *Reed I*.²⁰¹ The United States, however, acting as amicus, noted that the principle that a party who loses a law suit bears his own fees cannot be "'neatly applied to this matter.'"²⁰² The government suggested that the court, in its equitable discretion, should grant the master half of the costs incurred in unsuccessfully defending the earlier fee award.²⁰³ The district court, however, concluded that the special master should be fully compensated for unsuccessfully defending the earlier award because the local defendants had assured the court publicly and privately that they had no objection to the master's hourly rate, and

15.03[3], at 15-31 to -33 (1984); Note, *Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 339-40 n.279 (1982), and cases cited therein.

198. *Reed III*, 516 F. Supp. at 573 (footnote omitted). The district court noted that several of the *Johnson* factors (1, 2, 3, 5, and 9) were already considered in establishing the lodestar. The court observed that other factors, such as whether the fee was fixed or contingent, were not relevant to the special master situation. *Id.* at 573 n.11.

199. *Id.* at 574. The court did not examine the fifth factor, awards from other cases, because there were, as yet, few similar cases. *Id.* at 574 n.12.

200. *Id.* at 574 (quoting *Newton v. Consolidated Gas Co.*, 259 U.S. 101, 105 (1922)).

201. *Reed III*, 516 F. Supp. at 574.

202. *Id.* (quoting the response of the United States to the special master's fee application).

203. *Id.*

the state defendants originally had refused to assist the court in setting a reasonable figure.²⁰⁴ Thus, the court granted the master's request for attorney's fees and expenses incurred in litigating the earlier fee award.²⁰⁵ In all, the court awarded the special master \$522,900.17.²⁰⁶

The district court's decision in *Reed III* was appealed to the Sixth Circuit, which again reversed.²⁰⁷ As background to *Reed IV*, Judge Lively, again author of the unanimous opinion for the identical panel, reviewed his prior opinion in *Reed II*. There, the circuit court specifically had rejected the district court's view that the special master should be compensated at the full rates charged by experienced trial lawyers in Cleveland. The *Reed IV* court reiterated that it had adopted Judge Weinstein's conclusion in *Hart* and had approved hourly rates of \$65 for the special master and \$40 for his associates. Further, Judge Lively said that the circuit, in *Reed II*, had taken note of the Supreme Court's treatment of special master's fees in *Newton*.²⁰⁸ The circuit's opinion held that, in *Reed III*, Judge Battisti had erred in concluding that the *Hart* formula was not to be applied to the second fee request.²⁰⁹ The panel pointed out that *Reed II* had recognized the abilities of the special master, discussed his activities, and considered the rates charged by experienced local attorneys. The circuit nonetheless had concluded that the special master should not be compensated at the same rates as experienced private attorneys. The court could find nothing in the present record that required reconsideration of its earlier holding.²¹⁰

The circuit panel rejected the district court's idea that the work performed by the period covered in the second fee application was more

204. *Id.* at 574-75. The state defendants had intended to appeal whatever figure the court established.

205. *Id.* at 575. The special master was awarded \$33,308.75 in fees and \$16,975.57 in costs and expenses for the defense of the earlier award. The latter figure included over \$15,000 owed to a large private Cleveland law firm that represented the special master on the *Reed II* appeal. *Id.* at 575 n.14.

206. *Id.* at 575. This was divided into \$460,977.66 for professional and administrative services, \$50,284.32 for preservation and collection of fees, and \$11,638.01 in out-of-pocket expenses.

207. *Reed v. Rhodes*, 691 F.2d 266 (6th Cir. 1982) (*Reed IV*). The same panel that decided *Reed II* also decided *Reed IV*, which was concerned exclusively with the special master's fee.

208. *Id.* at 267.

209. *Reed IV* also noted Judge Battisti's statement that the panel in *Reed II* simply had followed a "passing remark" by Judge Weinstein. *Id.* at 267 n.1. The panel reminded the district court that whether or not it had been a passing remark in *Hart*, it had subsequently become the law of the circuit. *Id.* The panel also opined that in *Hart*, which it said was a valuable treatise on special masters, nothing was written without careful consideration. *Id.*

210. *Id.* at 268.

difficult than that covered by the first application and reviewed in *Reed II*. Indeed, the work in the second period was less time consuming. Even though the problems of implementation may have been more "tedious and vexing," the level of skill required was no greater than that in originally fashioning the remedy.²¹¹ Although the court recognized that Professor Nathan's article²¹² had distinguished between predecretal and postdecretal work, it noted that the article did not contend that the work of a postdecretal master was more difficult. Therefore, the panel felt that the district judge, the master, and the plaintiffs had seized upon a distinction without a difference simply to justify the district court's great departure from the circuit's clear directives in *Reed II*.²¹³

The *Reed IV* panel also admonished the district court for its analogy to rates of compensation for attorneys in public litigation. In *Reed II*, the court had spoken of "considerations, not rates" that applied to setting fees in that situation.²¹⁴ The circuit court explained that, in *Reed II*, it had not referred to the Attorneys Fee Award Act of 1976.²¹⁵ Moreover, some of the most important elements in setting an attorney's fee were clearly not present when setting the fee of a special master. Specifically, because the Act permits a reasonable attorney's fee only to the prevailing party, higher fees are justified when awarded because of their contingent nature.²¹⁶ In contrast, a master assured of a reasonable fee faces no risk of nonpayment.

Recognizing also that the Attorneys Fee Award Act sought to assure that attorneys would be willing to undertake unpopular causes, the court observed that a special master did not run the same risk as an attorney initiating a civil rights action. For example, the master need not be as visible as the attorneys or the district judge because of his quasi-judicial capacity. The circuit court observed that the special master in this case obviously had not suffered any stigma because he still was able to bill private clients for approximately 1,200 hours of work in each year

211. *Id.*

212. Nathan, *supra* note 8, at 428.

213. *Reed IV*, 691 F.2d at 268.

214. *Id.* (quoting *Reed II*, 607 F.2d at 746).

215. 42 U.S.C. § 1988 (1982).

216. *Reed IV*, 691 F.2d at 268-69. The panel quoted from a Sixth Circuit opinion that the district court had relied upon in *Reed III*, *Northcross v. Board of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), *cited in Reed III*, 516 F. Supp. at 570. However, the *Reed IV* panel quoted from the same page in *Northcross* to the effect that contingency was "the most significant factor . . . which at times renders the routine hourly fee unreasonably low" in setting an attorney's fee. *Reed IV*, 691 F.2d at 269 (quoting *Northcross*, 611 F.2d at 638); *see also* *Hensley v. Eckerhart*, 461 U.S. 424, 432 n.5 (1983) (implying criticism of *Northcross*).

that he served as master. Moreover, although certain attorney's fee factors were not applicable to setting a master's fee, in *Reed II* the circuit had taken into account those factors that did apply in both situations.²¹⁷

The panel also held that the district judge had erred in awarding more than \$50,000 to preserve and collect fees. The special master was entitled to defend the original award, but once he chose to be represented by a law firm on that matter, the court saw no justification for paying either the master or associates in his firm for their work on the appeal.²¹⁸ Because the master was a client and not an attorney in *Reed II*, he could not collect for the time he and his associates spent on the appeal, but only for the attorney's fees and expenses actually incurred.²¹⁹

In place of the rejected calculations of the district court, the appellate court granted the special master an award based on the previously approved hourly rates in *Reed II*, adjusted by the median rate of inflation for the period of the fee award.²²⁰ Finally, the panel ordered the master, who had been permitted to intervene in the *Reed IV* appeal as a party-appellee, to bear the costs on this appeal.²²¹

Calculating Masters' Fees

Fees for Work Done as Special Master

From the preceding discussion, four different approaches to the problem of calculating special masters' fees can be discerned, particularly in the institutional reform setting: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in *Newton*, that compensation should be "liberal but not exorbitant"; third, the *Hart/Reed II & IV* method of basing the fee on one-half of the pre-

217. The court gave as examples foreclosure from other work and the nature of the assignment. *Reed IV*, 691 F.2d at 269.

218. *Id.*

219. *Id.* at 269-70. In an otherwise scathing opinion of the work of the district court, the circuit panel remarkably did not question that the master was entitled to reimbursement for his unsuccessful defense of the prior award on appeal. See *supra* text accompanying notes 202-06. In other areas, it is hardly free from doubt that an unsuccessful litigant will obtain court-awarded attorney's fees from the victor. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677 (1983).

220. The adjusted hourly rate for the special master's services was \$74, with an overall rate for the special master and his associates of \$67 per hour. The court compared that to the fees paid to the special masters in the school desegregation cases in Columbus, Ohio (\$50 per hour), Milwaukee (\$50 per hour plus an office and staff services), and Boston (\$200 per day for each of four masters). *Reed IV*, 691 F.2d at 270 & n.3. For the master's last award, which would cover his final six months of service, the circuit panel ordered use of the base rates of \$65 and \$40 per hour, again adjusted for the median rate of inflation for the period. *Id.* at 270.

221. *Id.*

vailing rates for commercial attorneys; and fourth, the *Reed III* approach of basing the fee on some variation of the lodestar method of setting attorney's fees. This section evaluates each of these approaches and presents a variation of the most promising approach, that in *Reed III*, as the proposed standard for calculating special masters' fees.

Unbounded Discretion of the Trial Court

As discussed above,²²² by far the most common approach to setting special masters' fees is for the court to conclude that a figure is "acceptable," "reasonable," or "fair." In these cases, the court is exercising its discretion under Rule 53(a) of the Federal Rules of Civil Procedure²²³ or its predecessors in the Equity Rules.²²⁴ By definition, unbounded discretion is a standardless and therefore arbitrary method of establishing fees. An appellate court then finds it extraordinarily difficult to review a trial court's fee award. The parties cannot readily predict what a fee should be when planning the future cost of litigation. The parties also find it equally difficult to challenge such an award under an abuse of discretion test.²²⁵ Although the wide variety of tasks that a special master may assume makes it difficult to put strictures on the fees that might be awarded, the courts clearly can improve on a method that sets fees based on unguided discretion. Whatever the dubious merits of such an approach in purely private litigation, it is particularly inappropriate in any litigation involving public defendants, a salient characteristic of nearly all institutional reform litigation.²²⁶

In fairness to the parties and to the special master, a trial court should express carefully its reasons for setting the master's fee at a particular level. Unless the parties have stipulated to a fee-setting formula that the court regards as fair to the master, or the master joins in the stipula-

222. See *supra* text accompanying notes 65-67.

223. FED. R. CIV. P. 53(a); see *supra* text accompanying note 66.

224. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912); see *supra* text accompanying note 66.

225. See generally Levine, *supra* note 1, at 789 n.160 (citing articles attempting to put structure and limits on courts' discretion in the general context of institutional reform litigation).

226. The delicate nature of the problem of the federal courts mandating what states shall do with their budgets has been well described elsewhere. *E.g.*, Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978). The Supreme Court shows no signs of retreating from that premise. See, *e.g.*, *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984) (federal court cannot order remedy against state officials under state statute as interpreted by state supreme court). See generally Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

tion,²²⁷ a judge should be painstaking in evaluating a master's fee request and calculating a fee on the basis of rational criteria. Unbounded trial court discretion does not ensure satisfactorily such consideration.

The Newton Factors

As previously discussed, the Supreme Court in *Newton v. Consolidated Gas Co.*²²⁸ created a fee-setting standard that continues to receive recognition. The *Newton* test could be interpreted in one of two ways for present use. First, in the more general sense, a trial court could focus on *Newton's* language that "compensation should be liberal, but not exorbitant."²²⁹ That language is a reminder to exercise care with the limited funds of the litigants, but provides no particular standards under which a court can choose an appropriate level of compensation. This, of course, is little improvement over the unbounded discretion that judges have commonly used, mostly without reference to *Newton*. If used in this fashion, *Newton* becomes little more than a screen for the subjective choice of the district judge.

The second way in which *Newton* could have been interpreted, but apparently has not been in the six decades since it was decided, would be to take seriously as guidelines its comparisons to the salaries of the judiciary and other high state officers.²³⁰ As the accompanying table indicates, one can readily use the same rules of thumb as the Supreme Court did in deciding on an outside limit for a master's fee in a particular place at a particular time.²³¹ The figures generated are plausible as a range of maximum reasonable fees. A trial court might consider referring to contemporary salaries in a similar fashion, particularly when setting a fee for a master working on a per diem basis. This approach, however, necessarily assumes that the Supreme Court intended precise results when it used the particular offices as guidelines. More likely, the Supreme Court did not

227. Even with a stipulated fee, the court cannot abdicate its responsibility to review the master's fee request upon the motion of a party. See *supra* text accompanying notes 82-88.

228. 259 U.S. 101 (1922); see *supra* text accompanying notes 53-64.

229. *Newton*, 259 U.S. at 104.

230. See *supra* text accompanying notes 59-64.

231. The following table illustrates the potential application of the *Newton* guidelines to modern judicial and state salaries to derive a present-day equivalent of the special master's fee approved in *Newton*. The "Modern per diem" is calculated by multiplying the present salary of the benchmark official (1980's Annual Salary) by the multiplier permitted by the Supreme Court in *Newton* (\$49,250 divided by the 1922 Annual Salary) and dividing by 282 days, which the *Newton* Court used to the number of work days in a year. Two different rates are calculated by dividing the modern per diem by five hours and eight hours respectively. Finally, the means are provided.

intend such precision;²³² the Court probably referred to those other salaries simply to underscore the exorbitant nature of the special master's award in *Newton*. Therefore, such a "precise" approach should be used only with extreme caution. The fact that no court in sixty years has followed this method might be telling.

The *Newton* opinion probably will continue to be honored in the breach. At best, it provides only a slight check on the unfettered discretion of trial courts in setting special masters' fees. In this area, a different standard is required, which suggests further analysis of the different approaches taken by the district and circuit courts in *Reed*.

Half Commercial Rates (Hart and Reed II & IV)

One of the two careful post-*Newton* approaches to the special masters' fee problem is exemplified by Judge Weinstein's opinion in *Hart* and the Sixth Circuit opinions in *Reed II* and *Reed IV*.²³³ In those opinions, the respective courts adopted the principle that the special master should be compensated at approximately half of the prevailing attorney's fees.²³⁴ Unfortunately, those opinions do not indicate precisely what fee is to be halved. In *Hart*, the court referred to fees "obtainable by private attorneys in commercial matters."²³⁵ In *Reed II* and *Reed IV*, however, the Sixth Circuit referred to half of the highest commercial rates billed by

Office	1922 Annual Salary ^a	1980's Annual Salary ^b	Modern Per Diem ^c	Five Hour Rate ^d	Eight Hour Rate ^e
Chief Justice of U.S.	14,750.00	\$100,700.00	\$1,192.32	\$238.46	\$149.04
Assoc. Justice of U.S.	14,750.00	96,700.00	1,144.96	228.99	143.12
U.S. District Judge	7,866.67	73,100.00	1,622.87	324.57	202.86
Mayor of N.Y. City	15,000.00	80,000.00	931.44	186.29	116.43
Governor of N.Y. State	10,000.00	85,000.00	1,484.49	296.90	185.56
N.Y. Ct. App. C.J.	10,070.00	78,750.00	1,364.85	272.97	170.61
N.Y. Ct. App. Assoc. J.	10,000.00	75,600.00	1,320.32	264.06	165.04
N.Y. Supreme Ct. J.	17,500.00	60,900.00	607.77	121.55	75.97
Mean	—	—	1,208.63	241.72	151.08

^a See *supra* text accompanying notes 61-62.

^b See *supra* note 62.

^c Calculated on the basis of the following formula, which is designed to estimate modern per diem and hourly rates based upon the maximum allowance provided in *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1922):

$$\text{Modern per diem} = \left(\frac{\text{1980's Annual Salary}}{\text{1922 Annual Salary}} \times \frac{\$49250^*}{282 \text{ days per year}} \right) \div 282 \text{ days per year} \dagger$$

* Total award to special master on remand in *Newton*. See *supra* note 64 & accompanying text.

† *Newton*'s equivalent of one year's service. See *supra* text accompanying notes 61-62.

^d Calculated by dividing the "Modern per diem" by 5 hours per day, which was used in *Newton*, 259 U.S. at 104.

^e Calculated by dividing the "Modern per diem" by 8 hours per day, in order to reflect the heavier modern work loads (but commensurately higher salaries) of the benchmark officials.

The rates derived in this manner are comparable to contemporary commercial attorney's fees charged in New York City. See *How Firms Bill*, Nat'l L.J., Feb. 27, 1984, at 25, col. 4, 30-31 (partners bill from \$142-260/hour, \$183 average; associates bill from \$71-135/hour, \$98 average).

232. The *Newton* Court itself cautioned that the salaries it used for comparison were not to be taken as "a rigid standard." *Newton*, 259 U.S. at 106.

233. See *supra* text accompanying notes 111-15, 138-43, 207-10.

234. See *supra* text accompanying notes 111-15, 138-43, 207-10.

235. *Hart*, 383 F. Supp. at 767.

local private attorneys.²³⁶ This potential point of confusion could make a substantial difference in the actual fee awarded when the range of fees in commercial matters in a particular locale varies widely.²³⁷

There is, however, a more fundamental problem with the "half commercial rates" approach. In *Hart*, Judge Weinstein applied the "half commercial rates" approach to a special master who was a law professor. A law professor, like others in the academic community, has a public service component to his or her professional obligations. A professor's contribution of time to outside public service activities certainly is permitted and often expected.²³⁸ Thus, an academic institution does not expect a professor to perform outside work that will generate income for the institution; the institution encourages and supports faculty public service endeavors by a variety of services and overhead expenses, such as office space, secretarial and student research assistance, library books, stationery, and telephone service. A law professor or other academic appointed as special master, therefore, does not need to be compensated for general overhead or for lost profits.²³⁹ Although an academic may accept fees for public service work, the parties need not compensate him at rates set as if the professor-master personally incurred the overhead expenses of private practice.²⁴⁰

236. *Reed II*, 607 F.2d at 746. In *Reed IV*, the circuit panel instructed the district court to apply the rates allowed in *Reed II*, as adjusted for inflation. *Reed IV*, 691 F.2d at 270.

237. In most cases, the selected rate should be at or near the upper range of the local scale for persons of comparable experience, because anyone selected to be a master ought to be highly skilled and accomplished. "Since the master should be a person of outstanding and recognized competence, his compensation could be substantial." *MANUEL FOR COMPLEX LITIGATION*, *supra* note 8, § 3.21.

238. For example, this policy is explicit at the University of California. "A candidate for appointment, merit increase, or promotion . . . shall be judged by the following criteria: (a) Teaching, (b) Research and creative work, (c) Professional competence and activity, and (d) University and public service." University of California, Handbook for Faculty Members of the University of California 141 (1978) (quoting University of California, Academic Personnel Manual § 52). "[It is] assume[d] that each [faculty member] is devoting all his time and energies (his full 'working' time) to the University. Such service to the University includes varied types of activities, such as . . . public service." *Id.* app. XX, at 141 (text of University Regulation No. 3, Privileges and Duties of Members of the Faculty).

239. See *EEOC v. Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272, 1275-76 (5th Cir. 1980); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1329-30 (E.D.N.Y. 1985) (modified by the court before publication); *Gurule v. Wilson*, 525 F. Supp. 996, 997 (D. Colo. 1981). Moreover, because the award of a master's fee is not based on statutory authority, the legislative history of attorney's fees awards statutes, which suggests that a cost-based approach is not consistent with congressional intent, technically does not apply to awards to masters. See *Blum v. Stenson*, 104 S.Ct. 1541, 1546-47 (1984).

240. All out-of-pocket expenses of the master or the master's home institution ought to be reimbursed, however. See *Kyriazi v. Western Elec. Co.*, 465 F. Supp. at 1148 (citing *Hart*, 383 F. Supp. 699), for holding that fee of law professor in school desegregation case would be

Thus, in the *Hart* case an initial rate based on approximately half of local commercial rates to compensate the law professor for his service as special master seems entirely appropriate.²⁴¹ In contrast, this approach does not seem appropriate in the *Reed* situation, when the district judge chose a private practitioner as the special master. Unlike an academic, a private practitioner does have substantial overhead to cover. If an appointee is in practice with others, many people might depend on the fees that the appointee can generate, in order to pay a share of the overhead that permits the law firm to function.²⁴² If a judge appoints a private practitioner as special master, then it is only fair to compensate not only for that practitioner's time, but also for his foregone contribution to the firm's minimum operating expenses. Thus, while the *Hart* court might appropriately have adopted the half commercial rate standard for its situation, it is not valid for *Reed*.

The circuit court was too quick to adopt the *Hart* standard in *Reed II*. By the time it had an opportunity to review the matter in *Reed IV*, the court seemed more interested in admonishing the district judge to follow the law of the circuit and of the case than in rethinking the question in light of Judge Battisti's careful analysis in *Reed III*.

In sum, the "half commercial rates" approach is an appropriate starting point when the potential special master is someone, such as a professor supported by a university, who has no need to generate income directly to cover the overhead expenses of the institution. In such a case, the *Hart* formula would be reasonably easy to apply and the award simple to establish; it provides a measure that can be determined by evidence presented to the court through affidavits. The "half commercial rates"

about half that charged by attorneys in private practice, but all overhead costs paid. Some law firms would absorb many expenses and build their cost into the hourly rates. See *Reed III*, 516 F. Supp. at 572-73; Hildebrandt, *Billing and Cash Flow II*, in LAW OFFICE ECONOMICS AND MANAGEMENT 89, 91 (1977).

241. The initial "half commercial" rate may be adjusted up or down under the same considerations as are appropriate when adjusting the practitioner-master's lodestar rate. See *infra* text accompanying notes 251-77.

242. One recent estimate of annual overhead in large corporate firms is \$50,000 per lawyer. J. STEWART, THE PARTNERS 376 (1983). Another estimate is that 40-60% of a lawyer's gross income is absorbed by the costs of practice. Moldenhauer & McMenamin, *Fees and Billing*, in THE LAWYER'S HANDBOOK C3-5 (rev. ed. Supp. 1980). The United States Department of Justice has suggested that a fee award set at twice an attorney's hourly salary, not billing rate, will generally "provide reasonable compensation and cover normal overhead expenses." U.S. DEP'T OF JUSTICE, SECTION BY SECTION ANALYSIS TO PROPOSED LEGAL FEES EQUITY ACT, S. 2802, 98TH CONG., 2D SESS. 18 (1984); see also Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504, 28 U.S.C. § 1988 (1982)); OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT.

approach is surely within the general dictate of *Newton* that compensation should be "liberal but not exorbitant." It is not, however, a feasible approach for cases in which the special master comes from private practice.

Lodestar (Reed III)

Even though it was rejected by the supervising circuit, the most promising approach for cases in which the special master practices with a private law firm is the careful treatment found in *Reed III*.²⁴³ In that case, Judge Battisti attempted to take advantage of the work done by many judges since *Newton* in an area that did not exist at that time—court-set attorney's fees.

Judge Battisti's approach adhered closely to attorney's fees standards. He began by establishing a lodestar, which was calculated by multiplying a reasonable hourly rate times the number of hours reasonably expended. Then he took into account the fact that special masters perform a large variety of services by dividing the master's time into the categories of professional and administrative services. A master's services should be divided roughly in this fashion, because not all of the master's work requires the knowledge and experience of a senior attorney.²⁴⁴ Because discretion is vested in the trial judge, and precisely categorizing and assessing the market value of particular services is difficult, Judge Battisti's dichotomy and suggested rate differential seem sensible.²⁴⁵ Obviously, other systems could be devised, but this one is operable in a variety of cases. The master would be able to divide his bill into different categories if he knew in advance that the judge would be making such a division. The computerized billing systems that virtually all firms

243. See *supra* notes 157-206 & accompanying text.

244. The recognition of this fact is consistent with a leading attorney's fee opinion written by Judge Grady in *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983). At an early point in the case when setting guidelines for any potential attorney's fee award, Judge Grady put the plaintiffs on notice that, should they prevail on the merits and an award of attorney's fees be warranted, he would apply certain standards in reviewing the bills. Partners would be compensated at partner rates for work that could be done only at that high level of skill. Work that could be done by more junior people, such as routinely reviewing documents or doing basic research, would be compensated at appropriately lower rates, regardless of who actually performed it. *Id.* at 933. For an empirical study of lawyers' reactions to Judge Grady's widely publicized order, see T. WILLGING, JUDICIAL REGULATION OF ATTORNEYS' FEES: BEGINNING THE PROCESS AT PRETRIAL (1984); see also *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 591-93 (3d Cir. 1984) (affirming trial court's reductions of certain partner and associate charges to lower levels); 2 M. DERFNER & A. WOLF, *supra* note 9, ¶ 16.03[11] ("[T]he appellate courts have, with an uncommon degree of consistency, held that it is permissible to award different rates for different tasks.").

245. See *supra* text accompanying note 192.

now have easily could be adjusted to split bills into the established categories for review and payment.

With respect to the reasonableness of the hours expended, it is difficult to second-guess a master. In *Reed III*, the trial court found that the number of hours reasonably expended was in fact equal to the number of hours claimed.²⁴⁶ A master's time expenditure is heavily influenced by the parties' choices to litigate or to cooperate in particular ways.²⁴⁷ Except in the fairly rare cases of abuse that must be guarded against,²⁴⁸ the master's assessment of hours expended should be deemed reasonable. Although a judge should consider seriously any precisely focused challenge to a portion of the master's hours, this factor should not be a major problem in most cases.

Judge Battisti continued his analogy to the attorney's fee cases by creating a list of factors based upon those established by the Fifth Circuit in *Johnson v. Georgia Highway Express*.²⁴⁹ The judge used or adapted those factors that, in his view, applied to special masters in public litigation, and that could be used to adjust a lodestar figure.²⁵⁰ It is not clear, however, if all of these modified *Johnson* factors should apply to a special master who is compensated using a lodestar rate.

Preclusion of Other Employment

The first adjustment factor is whether a special master's appointment precludes other employment. Although the *Johnson* case did name this factor, it might not apply to masters. In *Johnson*, the Fifth Circuit was faced with an attorney who had taken on a case in the expectation of being paid only if he was successful, and who was precluded from other paying legal employment in the interim.²⁵¹ In the case of a master paid under a lodestar formula, however, compensation always is guaranteed. Therefore, even if there is preclusion of other employment, the master

246. This assessment was partially disputed by the Sixth Circuit in *Reed IV*. See *supra* text accompanying notes 218-19.

247. It may also be difficult to determine which efforts ultimately will prove productive. Cf. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (modified by the court before publication) (describing potential need to pursue blind alleys in the creative art of litigation).

248. See, e.g., *Louisiana v. Mississippi*, 104 S. Ct. 1701, 1702 (1984) (Burger, C.J., dissenting) (Master billed parties for 60 hours of time of a summer law clerk who did research on a motion to intervene.); *Universal Oil Prods. Co. v. Hall*, 76 F.2d 258, 264-65 (8th Cir.), cert. denied, 296 U.S. 621 (1935) (ordering partial return of award because master billed for 447 days of "utterly wasted" time).

249. 488 F.2d 714 (5th Cir. 1974); see *supra* text accompanying note 195, 198.

250. See *supra* text accompanying note 197-98.

251. *Johnson*, 488 F.2d at 718.

rarely should be entitled to receive additional compensation for having to forego other work.²⁵²

An increase from the lodestar under the preclusion of employment factor should not be permitted unless the other policy reason behind this factor, unexpected loss of business resulting from a conflict of interest,²⁵³ is demonstrated by the master. Attorney's fee rates, which are the basis for a lodestar rate, already take into consideration the general risk that, under professional responsibility rules, representing one client might preclude accepting other clients. There is no reason to compensate a master for this factor routinely when this risk already is built into the prevailing local attorney's rates.

One might possibly justify applying the preclusion factor when an attorney appointed as a special master is forced to close a practice temporarily during an extended appointment. In such a situation, it is reasonable to supplement the master's compensation to take into account the lost business during the transition period required to reestablish a practice after the appointment ends. During that period, the master would not be serving the court, but nevertheless, would not have a series of fee-generating legal matters "in the pipeline."²⁵⁴ In this rare instance, the court might consider a form of severance pay as a supplement for preclusion of employment during a short, but reasonable, transition period. Otherwise, such an increment is not justified.

Time Limitations Imposed

Experience has shown that special masters frequently have to work under difficult time constraints. The work may require meeting people at inconvenient hours, such as evenings and weekends.²⁵⁵ The court also may impose deadlines that will require the master to work long hours

252. In *Reed IV*, the circuit noted that the *Reed* special master was not precluded from other work—he was able to bill 1200 hours to other clients, which constitutes a substantial percentage of an average attorney's billings in one year. 691 F.2d at 269; see Hildebrandt, *supra* note 240, at 89; Moldenhauer & McMenamin, *supra* note 242, at C3-4. This point is consistent with other cases in which the courts have refused to grant increased compensation in the attorney's fee context when counsel is engaged in other contemporaneous litigation. See cases cited in Comment, *supra* note 194, at 360 n.137.

253. *Johnson*, 488 F.2d at 718.

254. See *infra* note 277; cf. *Aumiller v. University of Del.*, 455 F. Supp. 676, 683 (D. Del. 1978) (small firm awarded increased attorney's fee under preclusion factor because prosecuting civil rights suit on contingent fee basis created "cash flow problems"), *aff'd*, 594 F.2d 854 (3d Cir. 1979).

255. In *Reed III*, the district court mentioned the master's frequent Saturday work. 516 F. Supp. at 571; see also *Berger*, *supra* note 114, at 712-21 (describing special master's meetings at various times and locations).

without being able to control the schedule. For example, in a school desegregation case, a court might appoint a special master during the summer, when time is of the essence to implement a plan for the coming school year. Another example is a prison case, in which extremely dangerous conditions might require sudden emergency work. As with attorney's fees, however, this factor should not be applied in the absence of truly extraordinary time constraints.²⁵⁶ Attorney's fees are already priced at a premium in part because work occasionally must be done on short notice and at inconvenient hours. As with attorneys, there seems no reason to increase regularly a master's lodestar for this factor.

The Results Obtained

In the attorney's fee context, the results factor has taken on increased importance because of the emphasis given to it by the Supreme Court of the United States.²⁵⁷ Even with its enhanced importance for attorney's fees, the results-obtained factor should rarely be applied to a special master's fee. In general, the results-obtained factor will be used to reduce an attorney's fee award because the plaintiff has expended time and effort on unsuccessful claims. Special masters do not have comparable control of the course of litigation. The results obtained depend less on the master's judgment than on factors usually outside of his control. One could imagine, however, rare cases in which it is clear that the special master has done poor work or wasted substantial time²⁵⁸ or, alternatively, cases in which the master's extraordinary talents and hard work have engineered a result not otherwise obtainable.²⁵⁹ In those unusual

256. *Neely v. City of Grenada*, 77 F.R.D. 484, 486 (N.D. Miss. 1978), *vacated on other grounds*, 624 F.2d 547 (5th Cir. 1980); Comment, *supra* note 194, at 371-72.

257. *Blum v. Stenson*, 104 S. Ct. 1541, 1548 n.14 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 435-40 (1983). See generally Powell, *The Effects of Hensley v. Eckerhart on the Award of Attorney's Fees*, 8 FORDHAM URB. L.J. 527 (1980); Note, *Attorney's Fees—How Much Can a Partially Prevailing Plaintiff Recover in a Civil Rights Action?*, 59 TUL. L. REV. 473 (1984); Note, *Civil Rights—The Supreme Court's Test Under Section 1988*—*Hensley v. Eckerhart*, 20 WAKE FOREST L. REV. 485 (1984); *Attorney's Fees*, 34 DRAKE L. REV. 241 (1984).

258. See, e.g., *Reed II*, 607 F.2d at 747-48 (reducing award because appointment of an expert on law was abdication of court's role); *Glidden Co. v. Hellenic Lines*, 315 F.2d 162, 165 (2d Cir. 1963) (reducing \$3500 fee awarded by district court to \$1500, when report was one year late and prepared in haste); *Universal Oil Prods. Co. v. Hall*, 76 F.2d 258, 262 (8th Cir.) (Master claimed to have spent 447 days studying record preparatory to returning findings of fact and conclusions of law that the master, after being reduced to an examiner, was no longer required to write.), *cert. denied*, 296 U.S. 621 (1935).

259. See, e.g., Levine, Ewing & Levine, *The Use of Law for Prevention in the Public Interest, in Communities: Contributions from Allied Disciplines* 45-48 (L. Jason ed. forthcoming 1986; manuscript on file with *The Hastings Law Journal*) (discussing excellent results achieved by a skillful special master); see also *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1313 (E.D.N.Y. 1985) (modified by the court before publication) (rhetorically suggesting

situations, a court might consider decreasing or increasing a special master's lodestar. Normally, however, this factor should not lead to an adjustment from the lodestar.

The Undesirability of the Position

As with the other factors Judge Battisti culled from *Johnson*, undesirability of the position should not be a frequent reason for upward adjustment of a master's fee. The undesirability factor permits a court to compensate an attorney for the adverse economic impact on his practice arising, for example, from community hostility toward prosecution of particular civil rights claims.²⁶⁰ The applicability of this variable will depend heavily on the facts. In some situations, such as the extreme hostility in the Cleveland school desegregation case, a court might justify a fee enhancement for undesirability. In other situations, the special master may be more accepted and will not risk a loss of economic opportunities because of the undesirability of the assignment.²⁶¹

Another reason not to adjust the special master's fee for undesirability of the assignment is that special masters frequently are hired from a distant locale so that they will possess the required disinterested viewpoint.²⁶² A master appointed from another community, and who will return there after being discharged, is probably not economically vulnerable to the undesirability of a case. In contrast, an attorney who takes on

the propriety of applying a multiplier of 10 or more in a statutory attorney's fee award where counsel skillfully negotiated a complex settlement at a very early stage); *When the Court Awards Fees*, Nat'l L.J., July 8, 1985, at S2, col. 2 (reporting that Second Circuit Judge Mansfield, in remarks at Ninth Circuit Judicial Conference on Aug. 15, 1984, advocated generously rewarding reasonable early settlements with a fee multiplier of five to ten).

260. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (1974) (Civil rights attorneys face hardships because of their desire to help the civil rights litigant.); *Tasby v. Wright*, 550 F. Supp. 262, 282 (N.D. Tex. 1982) (The Court should recognize the hardship 12 years of proceedings have imposed on counsel.); *Vant Hul v. City of Dell Rapids*, 465 F. Supp. 1231, 1233 (D.S.D. 1979) (Public reaction to sex discrimination case could have adverse economic impact on attorney's future practice.).

261. See, e.g., *Miller v. Carson*, 401 F. Supp. 835, 859 (M.D. Fla. 1975) (Although reaction of the community was unpleasant, adverse economic impact on attorney's practice was not established.), *modified on other grounds*, 563 F.2d 741 (5th Cir. 1977). A further problem is that the adverse impact may not be known until after the special master is discharged and returns to private practice. Probably the best a court can do is to make an estimate based on the community reaction during the master's appointment.

262. For example, Vincent M. Nathan, who has served as master in prison cases in Ohio, Georgia, Texas, and New Mexico, has his private practice in Toledo, Ohio. Stephen LaPlante, the compliance coordinator of the Arkansas prison litigation, see *supra* note 110, moved from California to accept the position. He returned to California after the defendants were able to obtain the termination of his appointment. *Sue Gant*, master in *Gary W. v. Louisiana*, 429 F. Supp. 711 (E.D. La. 1977), *aff'd*, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981), came from New York. Personal Interview with Sue Gant (May 22, 1982).

an unpopular cause in his or her home town may have to live with the aftermath of that decision.

Awards in Similar Cases

As with attorney's fees, special master fee awards in similar cases both within and without the court's jurisdiction can be instructive, but are not binding.²⁶³ The precedents traced here demonstrate that special masters' fees frequently have been calculated in a less than precise fashion. Unless a court refers to an opinion with a reasonably careful calculation,²⁶⁴ the views of judges in other cases should be accepted gingerly. Fee awards in other cases can be informative; it is better practice, however, for the court to take evidence on the hourly rates prevalent in the local community²⁶⁵ and then to compute an appropriate master's fee on that basis. This practice is more sound than relying on haphazardly set fees in other cases from other locations at other times.

In sum, the additional factors Judge Battisti developed in *Reed III* as a modification of the *Johnson* factors will, in all probability, rarely lead to adjustment of the lodestar figure selected as the tentative compensation for the master.²⁶⁶ Nevertheless, there might be other factors that should be taken into account.

263. See *Pugh v. Rainwater*, 465 F. Supp. 41, 46 (S.D. Fla. 1979); Comment, *supra* note 194, at 376.

264. E.g., *Reed III*, 516 F. Supp. 561; *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141 (D.N.J. 1979).

265. When a master is not from the local area, the court also should take into consideration the master's own usual and customary professional fees. Cf. *Cunningham v. City of McKeesport*, 753 F.2d 262, 269 (3d Cir. 1985) (Trial court erred in applying rate other than hourly rate regularly charged by attorneys in question.); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 590-91 (3d Cir. 1984) (In figuring attorneys' fees, rates from attorneys' own communities were applied.); Third Circuit Task Force, *Court Awarded Attorney's Fees* 33, reprinted in 771 F.2d 5, 5-49 (1985) (recommending forum rate, even for out of town attorneys, except when special expertise is needed or local counsel are unwilling to handle the matter).

266. Thus in *Reed III*, Judge Battisti declined to adjust the special master's lodestar for the factors that the judge himself developed. The court noted that the master's firm suffered, he worked under severe time constraints, he produced work of excellent quality, and he accepted the position against advice that his reputation and practice would be hurt. The judge acknowledged that these facts would justify an upward adjustment from the lodestar, but he declined to make an adjustment because he was "mindful of the admonition in *Newton* . . . that '[t]he rights of those who ultimately pay must be carefully protected.'" *Reed III*, 516 F. Supp. at 574 (quoting *Newton*, 259 U.S. at 105). The court's refusal to enhance the lodestar is consistent with a more recent Supreme Court opinion suggesting, in the attorney's fee context, that the lodestar will generally not be adjusted upward. *Blum v. Stenson*, 104 S. Ct. 1541, 1549 (1984).

Proposed Modifications to the Lodestar Approach

Factors other than those enumerated in *Johnson*, and even beyond those developed in *Reed III*, should be considered before a lodestar figure is regarded as final. Several adjusting factors are proposed and analyzed here.

Contingency and Delayed Payment

Contingency is a factor dismissed as not relevant in *Reed III*. A special master's work on behalf of a court is not of a contingent nature.²⁶⁷ Assuming a good faith effort, a master will be paid regardless of the outcome of the case. Thus, the contingency factor applied in attorney's fees cases should be excluded from the consideration of a master's compensation.

A related factor, however, does enter into the calculus. A master may be paid promptly, or he or she may endure a long delay before being paid. For example, in the *Reed* case the master twice sought to recover for time expended more than two years in the past.²⁶⁸ In contrast, masters often have been permitted to obtain fees on an interim basis in other cases.²⁶⁹ Unlike an attorney in a fee-shifting context, the master is not required to wait until the end of a case before getting paid. In a situation in which the master will be paid promptly, it is reasonable to discount the rate of a master's fee to take into account prompt payment. Thus, when parties are ordered to deposit money with a court in advance to cover a master's projected fees, and the court controls the disbursements,²⁷⁰ a slightly lower hourly rate may be appropriate because the master will be paid promptly. In economic terms, the present value of the money is greater than if the master had to wait for a substantial amount of time before receiving compensation. If a long delay were foreseeable, such as when the parties consistently delayed in making payments to the master or when the court ordered that the master not be paid for a period of time, then the master could justify a higher rate to

267. *Reed IV*, 691 F.2d at 269.

268. *Reed II*, 607 F.2d at 742; *Reed III*, 516 F. Supp. at 564.

269. *E.g.*, *Reed IV*, 691 F.2d 266; *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.) (ordering interim deposit on fees), *modified in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *United States ex rel. Chamberlin Metal Weather Strip Co. v. Madsen Constr. Co.*, 6 Fed. R. Serv. (Callaghan) 567 (N.D. Ohio 1942).

270. This procedure is recommended by the National Institute of Corrections. NAT'L INST. OF CORRECTIONS, U.S. DEPT. OF JUSTICE, HANDBOOK FOR SPECIAL MASTERS (JUDICIAL VERSION) 29 (1983) [hereinafter cited as HANDBOOK FOR SPECIAL MASTERS]. This handbook contains a wealth of practical information for special masters and judges, including sample orders of reference, budgets, and itemized expense vouchers.

take into account the time value of money.²⁷¹

In establishing a prospective fee schedule, therefore, a court should provide that, if the master is not paid within a certain limited period after presenting bills to the defendants, such as thirty to sixty days, then the master should receive a premium rate to account for the lost time value of the money. Obviously, the built-in delay premium will depend on current rates of inflation. In a time of low inflation, and therefore low interest rates, the money's net present value will be less than in a time of higher inflation.²⁷² Imposing a penalty for delay of payment will, of course, also give the parties incentive to pay the master promptly. Given the resentments that might exist, such an incentive may be necessary. On the other hand, if large amounts of the parties' funds are deposited in advance for payment of the master's fees, then the money should be placed in an interest-bearing account to give the parties the same time value of their money. They will ultimately need to deposit less in the account because the interest will help to defray some of the master's fees.²⁷³

Desirability

Another factor that has not been widely considered is that a special master appointment may be highly desirable. The days of Master Elde

271. This principle was recognized in at least one older master's fee case. *Jesup v. Wabash, St. L. & P. Ry.*, 94 F. 20, 21-22 (C.C.N.D. Ohio 1899) (The special master received interest from the time of his original award because the decree was appealed, and all matters, including payment of costs, were reversed. Responsibility for the master's fee shifted from the appellant to the appellee.). For cases discussing awarding interest or adjusting the lodestar for delay in payment of attorneys' fees, see *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984); *Wojtkowski v. Cade*, 725 F.2d 127, 129 (1st Cir. 1984); *Spain v. Mountanos*, 690 F.2d 742, 747-48 (9th Cir. 1982); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); *Gates v. Collier*, 616 F.2d 1268, 1279 (5th Cir. 1980), *reh'g granted*, 636 F.2d 942 (5th Cir. 1981).

272. *Cf. Reed IV*, 691 F.2d at 270 (increasing permissible hourly fees by the median rate of inflation over period since base rates established). One convenient reference for estimating the inflation factor is the notice distributed to all federal judges by the Director of the Administrative Office of the United States Courts, pursuant to 28 U.S.C. § 1961 (1982), calculating interest on civil money judgments. The rate is set at the coupon issue yield equivalent of the average accepted auction price for 52 week United States Treasury bills. This variable standard is inflation-sensitive. Another appropriate reference is the Consumer Price Index ("CPI"), which is published by the federal Bureau of Labor Statistics. For discussion of how to apply the CPI in the attorney's fee context, see Swanson, *Court-Awarded Legal Fees: How They Can be Determined*, TRIAL, Aug. 1985, at 51, 52. An alternative way of handling this problem would be for the master to establish a line of credit at a bank, with the parties responsible for paying the interest charged. Any delay in payment would be the parties' direct expense.

273. *Cf. In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1328-29 (E.D.N.Y. 1985) (modified by the court before publication) (total attorney's fees and expenses paid from interest earned on settlement fund for class action matter).

chasing the Lord Chancellor with a basket of money to obtain his appointment are surely past.²⁷⁴ However, a substantial element of honor and prestige attends a court appointment to assist in a difficult and complicated matter. Although desirability is difficult to quantify, a court should consider it as a basis for discounting the hourly rate. An appointment from the Supreme Court of the United States, for example, would warrant such a discount for desirability.²⁷⁵ An attorney's future practice might well be enhanced by such a prestigious appointment.²⁷⁶ Other situations might warrant a lessor, or even no, discount for desirability.²⁷⁷

Professional Responsibility

A final consideration suggests that full "retail" rates need not always be paid to masters: attorneys are under professional responsibility obligations to perform some work pro bono or at reduced fees, and to assist the courts in the administration of justice.²⁷⁸ Appointment as a special master surely qualifies as such service to the courts and the administration of justice.

In sum, there are several reasons why a master's lodestar fee frequently should be adjusted downwards to a degree. There are few rea-

274. See *supra* note 17.

275. See *Louisiana v. Mississippi*, 104 S. Ct. 1701 (1984) (Burger, C.J., dissenting).

276. Cf. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1330 (E.D.N.Y. 1985) (modified by the court before publication) (Law professors' participation as plaintiffs' counsel may have enhanced their teaching skills.).

277. See *supra* text accompanying notes 98-99 (discussion of *Kyriazi v. Western Electric Co.*). In the nonremedial context, there should be little or no discount when, for example, a special master is appointed to supervise acrimonious parties in an otherwise routine discovery matter. See, e.g., *Eggleston v. Chicago Plumbers' Union*, 657 F.2d 890, 904 (7th Cir. 1981), cert. denied, 455 U.S. 1017 (1982) (discovery special master recommended "in view of the exceptional circumstances created by the past performances of counsel"); *Park-Tower Dev. Group, Inc. v. Goldfeld*, 87 F.R.D. 96, 98 (S.D.N.Y. 1980) (Special master was appointed to supervise discovery when "plaintiffs were acting somewhat as though they thought themselves in charge of the American Forces in World War II, and the . . . defendants were responding as though they were partisan guerilla fighters."). As a final example, one attorney who has served as special master in prison reform cases from several states, has a practice that has become heavily devoted to his masterships. See Pollock, *Q: What's a Toledo Lawyer Doing in a Georgia Prison? A: Running it*, AM. LAW., June 1983, at 97. If however, such a person desired to return to a standard private practice, he might have substantial difficulty reestablishing important contacts with commercial clients. See *supra* text accompanying note 254. When a master is appointed to a case beyond the focus of his or her commercial practice, probably no discount for desirability is warranted.

278. See, e.g., *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1148 (D.N.J. 1979) (masters accepted less than normal rates as part of obligations as members of the court's bar); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 comment (1983) ("The ABA House of Delegates has formally acknowledged 'the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services' without fee, or at a substantially reduced fee, in one or more of the following areas: . . . the administration of justice.").

sons that justify increasing the lodestar rate. Nevertheless, in view of the high quality of the people one would expect to be appointed as special master,²⁷⁹ the hourly rate used to establish the initial lodestar rate should be quite generous. In most cases, this rate should be at or near the top local hourly rates for attorneys of comparable experience. If a court chooses to adjust their lodestar modestly according to the principles discussed here, it should nevertheless recognize the general principle from *Newton* that compensation should be liberal, but not exorbitant.

Although the standards discussed here might be discomforting to some current masters because they suggest that fees should be reduced,²⁸⁰ they should be applied only when a court has not established already the terms and conditions of a master's compensation. It is one matter for a court to set a fee at a particular level that might or might not be at the attorney's customary billing rate, if it does so before a special master starts to serve, or when a master has agreed to leave compensation undecided until a later date. It is considerably different for a court suddenly to impose such conditions retroactively on an ongoing mastership when a higher rate previously had been established. In all likelihood, attorneys will consent to serve as special masters at rates established according to the proposed method if they know the accepted fee schedule in advance, even if the rates are lower than their customary fees.

Compensation for Unsuccessfully Defending a Fee Award

In general, in the context of a statutory award of attorney's fees, no fee can be awarded to an unsuccessful litigant.²⁸¹ A major assumption behind virtually all statutory attorney's fee-shifting schemes is that only prevailing parties are eligible for fees.²⁸² The Supreme Court has recently emphasized the principle that the amount of a fee award must be

279. See *supra* note 237.

280. On the other hand, some masters might find that they are being paid substantially below market rates as a result of the common standardless approach to setting their fees. A non-scientific survey by this author revealed a great variation in masters' fees. The author contracted all masters whose addresses are listed in the *Handbook for Special Masters*. See HANDBOOK FOR SPECIAL MASTERS, *supra* note 270. All of these masters served in prison cases. Those masters who responded to letters of inquiry reported having served recently or presently serve at hourly rates ranging from \$21.50 to \$150 per hour. In 1984, a special master in an original docket matter was paid \$200 per hour. *Louisiana v. Mississippi*, 104 S. Ct. 1701 (1984). A special master in a hazardous waste case is currently receiving \$250 per hour. *Legal Times*, Aug. 19, 1985, at 1, col. 1, 8, col. 3.

281. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

282. For discussion of the concept of prevailing party, see, e.g., 6 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 54.70[4], at 1306-12 (2d ed. 1985).

strictly related to the degree of the plaintiff's success on the merits²⁸³ when the statutory authority for fee shifting refers expressly to "the prevailing party."²⁸⁴

The same concept does not apply to special masters. Unlike attorney's fees, which the Supreme Court of the United States has held are not within the federal courts' power to grant absent statutory authority or extremely limited special circumstances,²⁸⁵ special masters' fees currently are left to the discretion of the federal district court. There is no concept analogous to "prevailing party" in the basic authority for the payment of masters' fees.²⁸⁶

More fundamentally, there is a difference in roles between attorneys and special masters. An attorney who has taken on a civil rights case understands the risk that he or she may lose, either at trial or on appeal. The fee structure, as established by the *Johnson* factors, recognizes this fact and provides, theoretically at least, a bonus for the contingent nature of the cases. In contrast, special masters bear virtually no risk of nonpayment. A master, as an officer of the court, should be paid for work that is done within the confines of the appointment. As discussed above, the master should neither receive a bonus for contingent work nor bear the risk that payment will not be made.²⁸⁷

In one situation, there is a risk of nonpayment. When it arises, the master must defend the fee award if he or she is to have any realistic chance of being paid. When an appeal is brought by a party who opposes a trial court's award, there is no one but the master to litigate in defense of the award. A nonappealing party who does not have to pay the fee award has no direct incentive to expend resources to defend the master's award, and the judge is obviously in no position to defend the award personally. By default, then, that task falls to the master.²⁸⁸

283. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

284. See, e.g., 42 U.S.C. § 2000a-3(b) (1982) (Title II, discrimination in public accommodations); 42 U.S.C. § 2000e-5(k) (1982) (Title VII, employment discrimination).

285. *Alaska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

286. *FED. R. CIV. P.* 53(a).

287. The unique status of the master's fee is recognized to some degree in the Federal Rules of Civil Procedure: The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. *Id.*

288. Thus, in *Reed IV*, the master was permitted to intervene in the appeal of the fee award. *Reed IV*, 691 F.2d at 269; see also 5A J. MOORE AND J. LUCAS, *supra* note 8, ¶ 53.04[2]. The special master might be able to secure representation from the United States Attorney in the local district, if he obtains approval from the Department of Justice pursuant to 28 U.S.C. § 516-17 (1982) and 28 C.F.R. § 50 (1985). See, e.g., *Falkowski v. EEOC*, 719 F.2d 470, 477-78 (D.C. Cir. 1983); Berman, *Intergrating Governmental and Officer Tort Liabil-*

Thus, the master is forced out of the role of disinterested court appointee and into the role of a litigant with a property interest to protect. The master is thrust into this situation, however, only because he or she has agreed to serve the court and now must defend a court order that ordinarily would be defended by a party. Therefore, treating the master as an ordinary litigant or an attorney for purposes of allocating the appeal expenses is unfair.

Because the standard of appellate review is abuse of discretion,²⁸⁹ the master will lose an appeal of a fee award only when the lower court has erred grievously. If the lower court has carefully considered how the master's fee should be calculated, and if the fee is established before the master begins work so that all parties are informed about projected costs, the master should win almost any appeal of a fee award. The expense of the appeal should be awarded to the prevailing master as a matter of course. Thus, this expense allocation issue should rarely arise.

Appellate courts should nevertheless be prepared to deal with the problem. Until more appellate courts adopt explicit standards for the calculation of masters' fees, a master can still lose part or all of a fee awarded by even the most conscientious lower court. Although some check on the master's ability to shift the cost of an unsuccessful defense of a fee award is necessary, the prevailing party standard is not appropriate for the reasons discussed above. Instead of creating a completely new formula, a circuit court could analogize to the Supreme Court's test for awarding attorney's fees to a prevailing defendant under Title VII of the Civil Rights Act of 1964.²⁹⁰

In *Christiansburg Garment Co. v. EEOC*,²⁹¹ the Supreme Court held that a prevailing defendant could be awarded attorney's fees only if "the

ity, 77 COLUM. L. REV. 1775, 1192-93 (1977). If the Justice Department declines representation when, for example, there is a conflict of interest, the Director of the Administrative Office of the United States Courts potentially has authority under 28 U.S.C. § 463 (1982) to pay some or all of the costs of legal representation. See also Administrative Office of the United States Courts, I-C Guide to Judiciary Policies and Procedures, ch. XI, part E (March 2, 1984) (regulations governing legal representation) (copy on file with *The Hastings Law Journal*). None of these statutes and regulations refer expressly to special masters. Upon request of the district court, however, the Administrative Office advised that it generally "would be inclined to request representation . . . should a special master be sued for actions taken in his or her official capacity." Letter from Assistant General Counsel David N. Adair, Jr. to author (Oct. 18, 1985) (copy on file with *The Hastings Law Journal*). It is unclear what the Administrative Office's position would be if a master were to request representation to defend an appeal of a fee award. A special master should examine the statutory alternatives before looking to the parties for reimbursement of attorney's fees in the manner suggested here.

289. See FED. R. CIV. P. 53(a).

290. 42 U.S.C. § 2000e-5(k) (1982).

291. 434 U.S. 412 (1978).

plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."²⁹² For special masters, an analogous standard is appropriate: the master should be entitled to his attorney's fee on appeal, even if the circuit court reverses the district court's original award for abuse of discretion, unless the master's position crossed the *Christiansburg* line. Thus, only in the most extreme cases should a special master not receive his expenses on appeal for defending a trial court's fee award. Analogous policies to those that prompted the Supreme Court to adopt a fairly extreme test in *Christiansburg* apply to this situation. Masters would be encouraged to accept appointments, and would be reimbursed for the expenses of even unsuccessful defenses of the fee awards, except in the most extreme instances.²⁹³ This would balance the masters' need to defend their fees and the parties' interest in not bearing the cost of the masters' defense of an utterly unreasonable award.

Once again, the *Reed* case provides an excellent example.²⁹⁴ In *Reed II*, the special master was partially unsuccessful in defending the fee award granted in *Reed I*. Nevertheless, in *Reed III*, the district court awarded expenses, including attorney's fees, for the master's defense of the original award, and in *Reed IV*, the circuit court upheld the concept of shifting such expenses.

In *Reed IV*, however, the Sixth Circuit court strongly rejected the attempt by the special master and the district court in *Reed III* to distinguish between pre- and post-decretal work as a means of differentiating the value of the work in the first and the later master's fee requests. The circuit saw this as a blatant attempt to evade the rule it established in *Reed II*. In such circumstances, it is not surprising that the circuit court held that the special master had to pay the costs of the unsuccessful appeal in *Reed IV*. A court could view the master's position in *Reed IV*, in which he defended an award from a trial court that had accepted his theory of how to ignore the law of the case and the law of the circuit, as crossing the *Christiansburg* line, because it was "frivolous, unreasonable or without foundation." Under these extreme circumstances, denial of

292. *Id.* at 421; accord *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (applying standard to 42 U.S.C. § 1988 awards). See generally the following student notes and commentaries on *Christiansburg*: Note, *Attorney's Fees in Title VII Actions: Applying the Christiansburg Standard for Awards Against the EEOC*, 5 CARDOZO L. REV. 881 (1984); Comment, *Title VII, Civil Rights of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*, 1976 WIS. L. REV. 207 (1976); 19 SANTA CLARA L. REV. 487 (1979); 47 U. CIN. L. REV. 318 (1978).

293. This generous standard should also serve to discourage appeals of fee awards, which supports the policies of prompt and sure payment to masters.

294. See *supra* notes 161, 201-05, 218-19 & accompanying text.

an award for the unsuccessful defense expenses would be justified. In contrast, in *Reed II*, which was also an unsuccessful defense of a master's award appeal, the master could not be accused of being unreasonable or frivolous. The circuit had not yet established a rule, and the district court obviously had considered the issue of an appropriate fee with care.²⁹⁵ Thus, the different treatment of the master's expenses for the unsuccessful appeal defenses in *Reed II* and *Reed IV* can be harmonized.

There remains the problem, discussed in *Reed IV*, of whether a special master who has hired outside counsel to defend the fee appeal is entitled to recover for both the counsel's fees and his or her own time. The Sixth Circuit distinguished between the two, and stated that the master was entitled to recover for the costs of the appeal in *Reed II* for outside counsel fees, but not for his own time in the appeal. In the court's view, the master had taken on the status of a client and was no longer acting as the special master. This rule is too strict. The special master should have ready access to outside counsel, which the Sixth Circuit's rule does encourage. If the master is permitted to hire outside counsel, he or she will not be distracted from the primary mission: serving as special master and doing the work that was the original purpose of the appointment. If the master is diverted by defending the fee award, then the limited time available will of necessity not be spent on the original task.²⁹⁶

The Sixth Circuit's refusal to permit payment for the master's own time on the appeal is unduly harsh because there will be times when at least some of the master's time should be compensated.²⁹⁷ The court re-

295. The same reasoning should apply for a master in any other circuit who sought to defend an award based on either *Reed III* or the standards proposed in this Article, or both. Of course, this author believes that the *Reed III* position is substantially correct; it is only in a procedural sense that the defense of the appeal in *Reed IV* might be characterized as "unreasonable or frivolous."

296. The outside counsel's fee, however, should be reviewed for reasonableness as would any court-set attorney's fee under *Christiansburg*. It should not be reviewed for success on the merits under *Hensley*.

297. Cf. *Duncan v. Poythress*, 750 F.2d 1540, 1543 (11th Cir.) (attorney appearing pro se, when other plaintiffs had counsel, entitled to fee award under 42 U.S.C. § 1988 (1982), although existence of other counsel might affect amount of fees if redundant legal services claimed), *opinion vacated & reh'g en banc granted*, 756 F.2d 1481 (11th Cir. 1985); *Cazalas v. Department of Justice*, 709 F.2d 1051, 1055-57 (5th Cir. 1983) (discussing policy reasons for permitting a fee award to a pro se attorney litigating a Freedom of Information Act claim, but not to a pro se lay litigant); *Ellis v. Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980) (awarding fee under *Christiansburg* to pro se attorney defendants who "did not seek out a chance for pro se litigation to compensate for an inactive practice; they were forced to defend against frivolous claims . . ."); *Rybicki v. State Bd. of Elections*, 584 F. Supp. 849, 859-61 (N.D. Ill. 1984) (three-judge court) (granting some fees to attorneys, who were also members of state legislature, who served as attorneys and pro se litigants in redistricting action); *Bradley, Pro Se*

viewing the fee request, however, should ensure that the master is not simply duplicating the work of outside counsel.²⁹⁸ For example, the special master rarely should be involved in writing an appellate brief beyond limited participation in early strategy sessions, and perhaps, quickly reviewing it in the final stages. Similarly, the master should not be compensated for time spent travelling to and attending oral argument before the appellate court.²⁹⁹ The master has nothing to contribute to such a time consuming function. There are, however, a few areas in which only the master or his or her office can act most efficiently. For example, the master should be compensated for preparing factual records concerning work performed. In sum, the master should not be absolutely barred from compensation for time spent on an unsuccessful appeal, even after he makes the wise decision to hire outside counsel, as long as his work clearly does not duplicate the work of the outside counsel.

Conclusion

This Article has reviewed the history of fees for special masters, revealing a long history of problems with these fees. In the past, masters working in a fee for service structure had a strong incentive to invent work or otherwise delay a case as long as possible. A contributing cause was lack of court supervision. This chronic problem can be avoided only if courts appointing special masters carefully review their fees. In a distressingly large number of cases, however, modern courts do not appear to be using any standards for the calculation or review of special masters' fees. The long history of abuse underscores the need for constant vigilance on the part of the trial courts.³⁰⁰ Cases in which the judges have attempted to review fees with some care, such as the *Reed* series discussed above, are few and far between.

Complainants and the Freedom of Information Act: Neglected, Not Rejected, 37 AD. L. REV. 15 (1985); Note, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act*, 53 GEO. WASH. L. REV. 291 (1984-85); Note, *Awarding Attorneys' Fees to Prevailing Pro Se Litigants*, 80 MICH. L. REV. 1111 (1982); Note, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659 (1982).

298. Cf. *Sun Publishing Co. v. Mecklenburg News, Inc.*, 594 F. Supp. 1512, 1517-18 (E.D. Va. 1984) (holding in statutory attorney's fee context that no fees would be awarded for duplicative work occasioned by midstream change in counsel).

299. Cf. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952-53 (1st Cir. 1984) (reducing attorney's fee award when two attorneys travelled to and attended each proceeding for plaintiff).

300. There are still occasional appointments that create some concern. E.g., *Touissaint v. McCarthy*, 597 F. Supp. 1388, 1421-22 (N.D. Cal. 1984) (A district court judge appointed his 26-year-old former law clerk the special master in prison case at a fee of \$75 per hour.); see *supra* note 6.

In the institutional reform litigation cases, and in other cases such as original docket matters in which the litigants are states, at least some of the litigants responsible for the fees of the masters are public entities. Accordingly, trial courts should be particularly careful before permitting the expenditure of public sums on special masters' fees. The courts certainly should be at least as scrupulous in reviewing the master's fees as they are in reviewing requests for attorney's fees under fee-shifting statutes. The sensitivities aroused by a federal court ordering a state defendant to expend funds on court-set priorities underscore the need for those expenditures to be carefully monitored by the court itself. Moreover, in some cases with masters' fees of spectacular size, such as the *Reed* cases in which the fees exceeded one million dollars, excessive special master's fees may deprive plaintiffs who have had their rights violated of money for direct services.³⁰¹

Federal courts have considered several fee standards in the recent past: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in *Newton*, that compensation should be "liberal but not exorbitant"; third, the *Hart/Reed II & IV* method of basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, the *Reed III* approach of basing the fee on some variation of the lodestar method of setting attorney's fees. This Article has proposed that the lodestar method be adopted with appropriate modifications to suit the case of special masters. After setting a lodestar, based on a reasonable hourly rate and hours reasonably spent by the special master, the court should consider a variety of factors that might affect the lodestar. These factors include preclusion of other employment, time limitations imposed, results obtained, desirability and undesirability of the position, awards in similar cases, delay of payment, and professional responsibility considerations. In many instances, the court will adjust the lodestar downward as a result of these factors; the court is less likely to make an upward adjustment. This Article also has proposed that a special master normally should be compensated even for an unsuccessful defense on appeal of a fee award. Finally, although this Article has focused on calculating fees for remedial special masters, the standards proposed here can be utilized readily to establish the fee of any special master.

The potential abuses of the special master office can be avoided if the

301. Cf. *Tonti v. Petropoulos*, 656 F.2d 212, 220-21 app. (6th Cir. 1981) (district court's opinion published as appendix at 218-21) (use of public funds for attorney's fees in school desegregation cases reduces funds available for education of plaintiff class benefited by litigation, citing *Reed II*).

courts are explicit from the outset as to the master's duties. It should be clear what will and will not be compensated, what the fees will be, and how the master will be paid. The final check on propriety comes when the court carefully examines the master's fee request, as did the *Reed III* court, to determine that it is fair and reasonable. The review urged here will impose an additional burden on the trial courts, and admittedly creates a new opportunity for "satellite litigation" that could be costly in itself.³⁰² Without a scrupulous examination of special masters' fees, however, the potential for abuse may ripen into scandal, as it has too often over the centuries.

302. Some have expressed concern that applying the lodestar method of calculating attorney's fees occasionally has imposed a burden on the courts. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 (3d Cir. 1984); 2 M. DERFNER & A. WOLF, *supra* note 9, ¶ 18.01, at 18-5 to -6; *When the Court Awards Fees*, Nat'l L.J., July 8, 1985, at S6, col. 1. But see Third Circuit Task Force, *supra* note 265, at 31-32 (recommending retention of the lodestar method, despite real deficiencies in the process). Reviewing a master's fee petition in even the most complex case will not be nearly as burdensome as some attorney's fee petitions have been. Cf. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1302-03 (E.D.N.Y. 1985) (modified by the court before publication) (describing efforts of court's expanded staff over three months to review fee petitions from over 120 lawyers); *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 68, 80 n.19 (E.D. Pa. 1983), *aff'd in part & rev'd in part*, 751 F.2d 562 (3d Cir. 1984) (73 hours of hearings needed to review 41 fee petitions for 160 lawyers).